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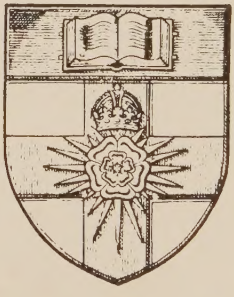

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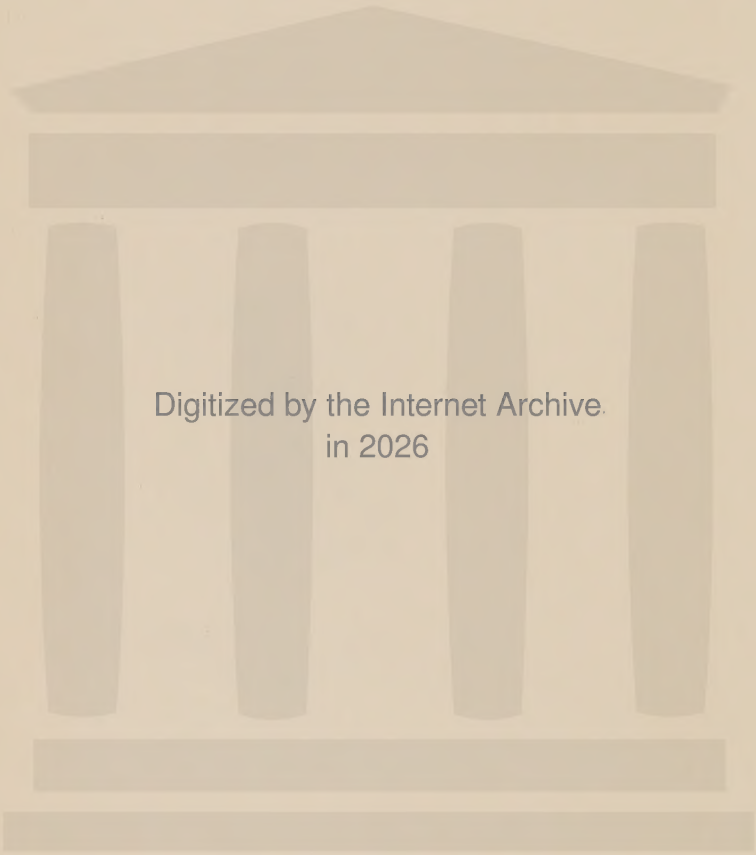
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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1923
May 2, 3.

PERFORMING RIGHT SOCIETY, LIMITED *v.* CIRYL THEATRICAL SYNDICATE, LIMITED.

[1921. P. 3201.]

Copyright—Musical Work—Infringement—Authorizing Performance—Permitting Theatre to be used for Performance—Managing Director of Company Licensee of Theatre—Engagement of Band—Performance by Band—Copyright Act, 1911 (1 *& 2 Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-ss.* 1, 3.

By s. 1, sub-s. 2, of the Copyright Act, 1911: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever," or "to perform . . . . the work or any substantial part thereof in public; . . . . and shall include the sole right,—(*a*) to produce, reproduce, perform, or publish any translation of the work . . . . and to authorise any such acts as aforesaid." . . . .

By s. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed

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by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." . . . .

By sub-s. 3 : " Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright."

A limited company was lessee of a theatre. The managing director held a licence from the Lord Chamberlain to have stage plays performed thereat. By agreement between the managing director and the company the former undertook to produce a play at the theatre ; the company undertook to provide the theatre and an efficient band of four musicians ; and it was agreed that the weekly takings during the run of the play should, after certain deductions, be divided in certain shares between the parties to the agreement. The managing director by agreement with a bandmaster engaged a band of four musicians to perform at the theatre under the direction of the bandmaster. In the absence and without the knowledge of the managing director the band on two occasions performed musical works, of the copyright in which the plaintiffs were the owners, without the consent of the plaintiffs.

In an action by the plaintiffs against the company and the managing director for the infringement of their copyright :—

Held, that the latter defendant had not infringed the copyright either by authorizing the performance of the musical works within s. 2, sub-s. 1, or by permitting the theatre to be used for the performance of the works within s. 2, sub-s. 3.

Judgment of Rowlatt J. [1923] 2 K. B. 146, as against this defendant, reversed.

APPEAL from the judgment of Rowlatt J. in an action tried before the learned judge without a jury. (1)

The plaintiffs were the owners of the copyright in two musical works known as " Mary " and the " Colonel Bogey " march. The defendant the Ciryl Theatrical Syndicate, Ld., was the lessee of the Duke of York's Theatre in St. Martin's Lane, London. The defendant Philip Michael Faraday was a shareholder in and the managing director of the defendant syndicate, which was a limited company.

When the defendant syndicate became lessees of the theatre in the year 1918 a verbal agreement was entered into between the defendant Faraday and one Bobbe, a professional musician, that the latter should provide an orchestra under

(1) [1923] 2 K. B. 146.

his management and direction to perform at the theatre at a remuneration of 30*l.* a week.

On November 29, 1920, a licence was granted by the Lord Chamberlain to the defendant Faraday to have stage plays performed at the theatre on every day during the currency of the licence except as therein specified "upon the understanding that the above named actual and responsible manager" should "be subject to the rules and regulations annexed" to the licence. The licence stated (clause 4) that the manager would be held solely and entirely responsible for the carrying out of the Lord Chamberlain's regulations (which must be printed and posted in the theatre) for the management of his theatre before and behind the curtain and for the safety of the public and members of the company. The regulations related to doors of exit and entrance, gangways, passages, and staircases; fire appliances and precautions; lighting, use of limelight, acetylene and other inflammable gas, and explosive substances; structure and seating of the theatre, and the character of the performances.

On June 8, 1921, an agreement in writing was made between the defendant Faraday, therein called the licensee, and the company. It recited that the licensee was desirous of giving at the theatre performances of a play entitled "The Wrong Box." By clause 1 the company agreed to provide the theatre and dressing rooms, with certain exceptions, together with the necessary machinery, fixtures, fittings, and effects belonging to the superior landlords and in and on the theatre. By clause 2 the rights granted by the agreement were to commence on June 16, 1921. By clause 3 the company agreed to give the licensee the services of the permanent staff of the front of the theatre—namely, the fireman, night watchman, stage doorkeeper, housekeeper and cleaners—and in case of death or incapacity to provide substitutes. By clause 5 the licensee agreed to provide and run the play with a full and competent company of performers and stage hands and all scenery, dresses and properties and every requisite behind the curtain save as aforesaid.

By clause 6 the company agreed to provide and pay an

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efficient quartette orchestra. By clause 8 the licensee agreed to take over and employ the permanent staff as mentioned in the schedule to the agreement and to pay them the sums mentioned therein, and not to dismiss any of them except with the concurrence of the company, which should not be withheld in case of gross misconduct. By clause 9 the licensee agreed to produce the play on June 16, 1921. By clause 12 the licensee was to be responsible for all accidents to any person in his employ or concerned in his business and to indemnify the company against all claims therefor.

By clause 16 it was provided that all moneys paid for admission to the theatre, except for proprietary seats, should be received by the company and after deduction of entertainment tax and certain commissions the takings should be shared between the company and the licensee as follows: On the takings in each week up to 1200*l.* the company should have 45 per cent. and the licensee 55 per cent., on the excess in each week over 1200*l.* but not exceeding 1500*l.* the company should have 40 per cent. and the licensee 60 per cent., and on the excess in each week over 1500*l.* the company should have 35 per cent. and the licensee 65 per cent. By clause 22 the licensee agreed to run the play until the termination of the agreement or until notice as therein provided.

In pursuance of this agreement the defendant Faraday produced and ran the play at the theatre. At the top of the programme of the play appeared the words "Mr. Michael Faraday presents" the play. At each performance during the intervals between parts of the play the orchestra gave musical selections. During the performance on July 14, 1921, they played among other pieces part of the said work named "Mary" without having obtained the consent of the plaintiffs.

On July 15 the plaintiffs' representative wrote to the defendant Faraday: "I learn that you are now running the Duke of York's Theatre, but have not taken out the licence of this society, of which you are a member, for the use of our repertoire thereat. That our music is being used is clear,

for I myself heard last night . . . . selections from the music of 'Mary' (Love's Nest) performed during the entr' acte. . . . ." Signed JNO. WOODHOUSE, Controller. The defendant Faraday was away and this letter was not answered.

On July 25 the plaintiffs' representative wrote again.

On July 27 the orchestra again played a selection from "Mary" and also the "Colonel Bogey" march. On July 28 the plaintiffs' representative wrote to the defendant Faraday: "I am still awaiting the favour of a reply to my letter of the 15th inst., but I learn that you are away from town. Nevertheless the infringement of this Society's works by your orchestra at the Duke of York's Theatre continues, for it is reported to me that at the performance last night the selection from 'Mary' was again performed, as also the march 'Colonel Bogey,' the public performing right of which is controlled by this Society. . . . ."

On August 10 the plaintiffs' representative wrote again: "I now learn from your office that you will probably be out of town until the end of September, and as I understand letters are forwarded to you I trust you will not delay until your return to town dealing with my letter of the 15th ulto., in which I notified you of the unauthorized use of the Society's repertoire at the Duke of York's Theatre. Will you please give the matter your early attention." Signed W. D. WOODHOUSE, Controller.

On August 10 the defendant wrote: "I certainly am not inclined to take out a licence from the Performing Right Society for I have not sufficient interest in the matter, as I have written to you over and over again in the last few years. I engage an orchestra who provide their own music and if they are infringing any copyrights you must look to them and not to me. I do not care in the least what they play; it makes no difference to me and indeed I am seriously considering doing without an orchestra at all. Added to these matters I am not running the Duke of York's. It is a Syndicate called the Ciryl Syndicate and the Secretary is Mr. G. A. Macdonald of 2 and 3 Norfolk Street, Strand. . . . ." Signed P. M. FARADAY.

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On August 13 the plaintiffs' representative wrote to the defendant Faraday: "I have your letter of the 10th inst., which I do not quite understand. It is my plain duty to see that the rights of this Society are respected and protected. You say you engaged an orchestra. If so you are responsible for the music they perform. But you go on to say further that you are not running the Duke of York's. If so how came you to engage the orchestra? Do you differentiate between running the theatre and running the play? Kindly make the position a little more clear to me." Signed W. D. WOODHOUSE, Controller.

On August 24 the defendant Faraday wrote: "Thanks for your letter of the 13th. I have been away or I would have answered it before. I have nothing to do with the orchestra at the Duke of York's although I did engage it on behalf of the Syndicate. I am however so sick of the petty trifles of running a theatre that I have given the orchestra notice to quit. . . . ." He subsequently re-engaged the orchestra.

On May 15, 1921, the plaintiffs brought the present action against both the defendants, in which they claimed damages and an injunction for the infringement of their copyright in the two works named by performing in public and authorizing the performance in public of the said works without the plaintiffs' consent, and by permitting the theatre to be used for the performance of the works without the plaintiffs' consent, for the private profit of the defendants within the meaning of ss. 1 and 2 of the Copyright Act, 1911. (1)

Rowlatt J. gave judgment against both defendants.

The defendant Faraday appealed.

Cyril Atkinson K.C. and *E. F. Spence* for the appellant. The appellant neither performed nor authorized the performance of the musical pieces in question. He was absent at the time of the performance, and the band when engaged were not his servants or agents but the servants or agents of

(1) See Headnote.

the Syndicate. A managing director is not responsible for all that is done by his company, but only for those acts which he has in fact authorized or in which he has taken part. Unless he by himself or by his agent takes part in the performance he is not responsible for the infringement: *Russell* v. *Briant*. (1)

[They were stopped.]

Merriman K.C. and *Hon. S. O. Henn Collins* for the respondents. The persons liable for a tort, be it fraud or infringement of copyright, or any other wrongful act, are first those who actually commit the wrongful act, in this case the band of musicians; secondly those who concur in it, who either do something to produce the wrongful act, or abstain from doing something which they are under an obligation to do in order to prevent the infringement, in this case the appellant; thirdly the principal for whom an agent in the performance of his duty commits the wrongful act, in this case the Syndicate: *Cargill* v. *Bower*. (2) The appellant falls within the second class because he, the actual and responsible manager of the theatre, omitted to exercise any control or supervision over the band. Those who have control are responsible for the acts of their subordinates: *Betts* v. *De Vitre*. (3) To authorize a performance it is not necessary that the authority should be conferred expressly by writing or word of mouth or inferentially by the actual presence of the principal aiding and abetting. The authority may be implied from other acts, for example when a responsible manager absents himself and releases all control over the performance: *Marsh* v. *Conquest* (4); a fortiori if he openly disclaims any interest in or concern with it. The correspondence in this case and especially the appellant's letters of August 10 and 24, show an indifference from which the learned judge properly inferred that he had permitted the theatre to be used for the performance.

[ATKIN L.J. referred to *Lyon* v. *Knowles*. (5)]

(1) (1849) 8 C. B. 836.
(2) (1878) 10 Ch. D. 502, 513, 514.
(3) (1868) L. R. 3 Ch. 441.
(4) (1864) 17 C. B. (N. S.) 418.
(5) (1863) 3 B. & S. 556; (1864) 5 B. & S. 751.

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That case was decided under the Dramatic Copyright Act, 1833, where the words were "cause to be represented," not, as here, "authorize," or "permit" the use of a theatre for, the performance.

[*Monaghan* v. *Taylor* (1) and *Performing Right Society* v. *Bradford Corporation* (2) were also cited.]

Counsel for the appellants were not called upon to reply.

BANKES L.J. This is an appeal from the judgment of Rowlatt J. for the plaintiffs, who complained that on July 27, 1921, without their consent the defendants either authorized the performance at the Duke of York's Theatre, or permitted the use of that theatre for the performance, of certain musical works of which the plaintiffs owned the copyright. The defendant Faraday is the only appellant. He says there was no evidence to warrant the conclusion at which the learned judge arrived. The two questions to be considered were whether there was any evidence that the appellant (1.) authorized the performance of these musical works by the band of the theatre on the particular days or (2.) permitted the use of the theatre for his own private profit for the performance of the works on those occasions.

Now it is not contended that the band collectively or members of the band individually were agents or servants of the appellant, and therefore no question relating to any performance by an agent or servant of the appellant arises. The question is how far the appellant is responsible for the unwarranted performances of the band on July 14 and 27, 1921. His exact position must be considered. I take his position from his answer to the first interrogatory. He says: "I was the licensee of the Duke of York's Theatre, St. Martin's Lane, on July 27, 1921. As agent for the defendant Syndicate under an agreement in writing dated June 8, 1921, I agreed to produce the play the subject matter of the performance at the said theatre on the date aforesaid and was entitled to and received the share of proceeds of

(1) (1886) 2 Times L. R. 685.
(2) (1921) Copyright Cases (Macgillivray), 309.

performances therein stated." That was the appellant's position. By the agreement of June 8, 1921, the Syndicate agreed to provide and pay for an efficient quartette orchestra. Thus the band, whose performance of these pieces of music is complained of, were employed by and were the servants of the Syndicate. The appellant was probably in a position to tell the band that they must not perform any particular piece to which he objected and to dismiss the band if his order was not obeyed. Whether he had the legal right to do this is another matter. In fact he did ultimately dismiss this band. To that extent therefore I assume that he had authority over the band though they were not employed or paid by him.

In order to succeed the respondents had to adduce evidence either of authority given by the appellant for the performance, or of permission to use the theatre for the performance, of these pieces. I agree with Mr. Henn Collins that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of.

In the present case I cannot draw the inference which the learned judge drew from the conduct of the appellant. The band was employed and paid by the Syndicate; in July, 1921, the appellant was abroad; there is no evidence that he either knew or had reason to anticipate or suspect that the band in his absence were likely to give performances which would be infringements of copyright. A letter was written to him on July 15 calling his attention to an alleged infringement by the band, but there is no evidence that it ever reached him. A second letter was written on July 28 again complaining of an infringement by the band. The appellant was still abroad. He does not seem to have returned until

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some time in September, as I gather from a letter of August 10 from the respondents' representative. Then there is a letter from the appellant dated August 10 to which the learned judge attached an importance which I do not think it deserves. It does not appear from where it was written. [The Lord Justice read the letters of August 10 and 24 from the appellant, and proceeded:] I agree that those letters do show indifference of a kind, but I say emphatically not of a kind to warrant the inference of authorization or permission. It was the indifference of one who did not consider it his business to interfere, who had no desire to see another person's copyright infringed, but whose view was that copyright and infringement were matters for the conductor or bandmaster to consider. The indifference from which permission or authorization is to be inferred is of a very different character, of which *Monaghan* v. *Taylor* (1) is an example. The performance there was by an agent introduced to sing whatever songs he chose, the principal's conduct indicating that he did not care whether the performance was an infringement of copyright or not. In addition it appears that the performance was heard in whole or in part by the principal himself. In those circumstances the question was left to the jury whether they inferred that the principal authorized the infringement. The jury found for the plaintiff and a Divisional Court confirmed the decision, holding that no objection could be taken to the summing up of the learned judge, and that the verdict should stand. Both the judges in the Divisional Court thought the evidence justified the finding that the performer was the agent of the principal, and incidentally the Court expressed an opinion inconsistent with Mr. Henn Collins' contention in this case that without evidence of agency, and merely on the evidence in this case, the appellant could be found to have authorized these performances or permitted the use of the theatre for the performances.

I have only to add that, as Atkin L.J. has pointed out to me, when *Lyon* v. *Knowles* (2) came before the Exchequer

(1) 2 Times L. R. 685. (2) 5 B. & S. 751, 752.

Chamber the judgment of the Court was reported in this form: "The Court said the question was rather one of fact than of law. But so far as any question of law was involved they thought the defendant not liable. He took no part in the matter, and there was no evidence to show whether he did or did not know what particular pieces were represented. The judgment of the Court below must therefore be affirmed." In my opinion, there was no evidence on which the learned judge could properly come to the conclusion that the appellant in the position in which he was, the band not being his servants or agents, authorized the performance of these particular pieces, and the evidence falls far short of establishing that he permitted the use of the theatre for the performance of them. The appeal must be allowed and the judgment set aside.

SCRUTTON L.J. I am of the same opinion. Cases of this class have given the Courts much trouble in the past and will no doubt continue to do so in the future. The question is one of the liability for infringement of copyright by persons who do not actually take part in the infringing performance, but are more or less interested in the place of performance and have some control over the performers. In this case an infringement of a copyright took place in a theatre where the band played pieces in which the respondents had the copyright without the consent of the respondents. One would have thought that the obvious course would be to sue the members of the band who actually committed the infringement; but the respondents, for reasons of policy of which no doubt they are the best judges, have not done that. They have sued the principals, the Syndicate, a limited company whose servants or agents the band were, and have got judgment against the company. We have nothing to do with that judgment because the company has not appealed. They have also got judgment against a person who was the managing director of the company, the principals, and who as managing director engaged the band and held the Lord Chamberlain's licence to have plays performed at the theatre,

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for the reason that the Lord Chamberlain will not accept companies as licensees of theatres. This particular person was away from England when the infringement took place and knew nothing whatever about it. He appeals from the judgment recovered against him. The question is whether he comes within the words of the Copyright Act, 1911.

It is clear from *Monaghan* v. *Taylor* (1) and *Lyon* v. *Knowles* (2) that he could not have been hit by the old Act. The Act of 1911 made a change. It first defines copyright as "the sole right to produce or reproduce" a work, and "to perform the work," and then it adds "and to authorize any such acts as aforesaid." Now if one person has the sole right to produce a work, I suppose no one else has the right to perform it; and I suppose the person who has the sole right to perform the work, and he alone, may authorize another to perform it. Consequently I am disposed to agree with a distinguished writer on copyright (3) that the words "to authorize any such acts as aforesaid" are superfluous and add nothing to the definition. Notwithstanding this, there seems to have been much discussion in the Court below on the meaning of these superfluous words. It was argued that under s. 2 copyright is infringed by any one who, without consent of the owner of the copyright, authorizes the performance of a work in public, and no doubt he does infringe; but the answer to that argument seems to me to be that the band were not the servants or agents of the appellant, who as agent for the company appointed the band to the position of servants or agents of the company. As in *Lyon* v. *Knowles* (2) a person in the appellant's position was held not to have caused a work to be performed, so the appellant cannot be held to have authorized this work to be performed.

Another attack was made on the appellant under s. 2, sub-s. 3, on the basis that for his private benefit he permitted the theatre to be used for the performance in public of the pieces. In my opinion, first, a man does not permit who

(1) 2 Times L. R. 685.
(2) 3 B. & S. 556; 5 B. & S. 751.
(3) Macgillivray, Copyright Act, 1911 (1912), p. 22.

cannot control, and secondly, a man does not permit the use of a place for the performance of a work if he does not know the work is being performed. The appellant, who was away on the Continent, knew nothing of these performances. Therefore on neither attack can the respondents succeed. They cannot make out that the appellant authorized the performance because he has not caused it, the persons who performed the pieces not being his servants or agents, but the servants or agents of his principals, the company; and he has not permitted the theatre to be used for the performance of the pieces because, although as agent for the company he engaged the band and left to them the choice of works to be performed, he did not know that they were performing these pieces at all and did not know and had no reason to consider whether they were the subjects of copyright. This seems to me to be in accordance with *Monaghan* v. *Taylor*. (1) In summing up in that case A. L. Smith J. left two alternatives to the jury: (1.) whether the defendant had engaged the band leaving to them the music to be performed and not knowing what that music would be, in which case they should find for the defendant; or (2.) whether he had engaged the band to perform and knew the work in question was being performed, in which case they should find for the plaintiffs. The jury chose the second alternative. In the Divisional Court there was a faint attempt to argue that if a man engages a band to perform such pieces as they choose he permits the performance of pieces they choose to play, though he does not know what those pieces are. The Court said it was unnecessary to argue that point further. For these reasons I think the learned judge came to a wrong conclusion in holding the appellant liable. The appeal must be allowed.

ATKIN L.J. Infringement of copyright is a well known tort. Without trying to resolve the doubts about the origin of copyright, one may say that from the beginning the right has been regulated by statute. The defendant who appeals

(1) 2 Times L. R. 685.

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in this case is the managing director of a company. The company employed a band which performed certain works the subject of copyright. The company have been held liable as employers of the band for authorizing the performance of the works by their servants, or permitting the use of the theatre for that performance. The company has not appealed. The appeal is from the judgment against the managing director.

Prima facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. That is authoritatively stated in *Rainham Chemical Works* v. *Belvedere Guano Co.* (1), where it was sought to make a company liable for an explosion upon their works in the course of manufacturing high explosives. The company were held liable on the principle of *Rylands* v. *Fletcher.* (2) It was also sought to charge two directors with liability. They were eventually held responsible because they were in fact occupiers of the works. It was contended that they were liable on the ground that they were managing directors of the company, that the company was under their sole control as governing directors, and that they were responsible for the work done by their servants. Lord Buckmaster said (3): "I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads." Perhaps that is put a little more narrowly than it would have been if it had been intended as a general pronouncement without

(1) [1921] 2 A. C. 465. (2) (1868) L. R. 3 H. L. 330.
(3) [1921] 2 A. C. 476.

reference to the particular case; because I conceive that express direction is not necessary. If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly. In this case there is no suggestion that the appellant was privy to the commission of this wrongful act. He was away at the time. He had no idea what pieces were being performed. He gave no instructions or directions to the band to play the works in question. No one would think of holding a managing director responsible for all the wrongful acts committed by servants of the company in such circumstances. How does this particular wrongful act differ from others? It is said that the appellant authorized the performance within the meaning of the Act. I think the plain answer is that he did not. The employers of the band may be said to have authorized the performance in pursuance of a general authority, on the footing that an employer may be deemed to authorize acts done by his servant in the general scope of his employment; but that doctrine does not apply to a servant whose business is to engage other employees and even to dismiss them, and in the general scope of whose business the act complained of does not fall. To make such a servant liable he must be privy to the tortious act.

The other suggestion is that the appellant permitted the theatre to be used for the performance of the works for his private profit. How did he permit the theatre to be used? He was a servant of the company. If anybody permitted the theatre to be used it was the company who were the lessees in law and in fact. I find it impossible to say that he permitted the theatre to be used for this purpose merely because he was the person licensed by the Lord Chamberlain. I agree with Scrutton L.J. that s. 3 of the Act does not apply to the permitting of performances of a work unless the permission particularly relates to the work the performance of which is complained of. Such a permission is not to be inferred from a merely general authority to use a theatre for the performance of musical works. That this is the intention is indicated by the words at the end of the section

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conferring protection, not on those who have no reason to suspect that the work was going to be performed, but on those who have no reason to suspect that the performance will be an infringement of copyright.

I desire to reserve for consideration the question whether a principal can be said to have authorized the performance of a work when he himself has given a general authority. I do not wish to express any opinion on *Performing Right Society* v. *Bradford Corporation*. (1) In the circumstances of this particular case there was no evidence on which it can fairly be said that the appellant had committed any wrong either generally or on the terms of the Act. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Macdonald & Stacey.*
Solicitors for respondents: *Syrett & Sons.*

W. H. G.

K. B. D. 1923 *Jan.* 12.

C. A. *June* 1, 4.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

MICHAEL *v.* PHILLIPS.

Landlord and Tenant—Rent Restriction—Increase of Rent—Condition precedent—Impossibility of Performance—Notice of Increase—"Attendance"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 1, 3, 12.

The landlord of a flat which by reason of its rateable value was a dwelling house within the Rent Restriction Act, 1920, had let the flat to a tenant before the passing of that Act for a term expiring on March 25, 1920, at a rent of 107*l.* 18*s.* a year, which was the standard rent. On February 17, 1920, the landlord's executors granted to the tenant a lease of the flat for seven years from March 25 at a rent of 160*l.* a year. On July 2, 1920, the Rent Restrictions Act, 1920, was passed.

The lessors claimed a quarter's rent under the lease. The lessee counterclaimed for payments made in excess of the standard rent:—

Held, by the King's Bench Division and the Court of Appeal, that the lessors could recover nothing above the standard rent and must repay what they had received in excess thereof, no notice in writing of their

(1) (1921) Copyright Cases (Macgillivray), 309.

intention to increase the rent having been served on the lessee as prescribed by s. 3, sub-s. 2, of the Act of 1920; that the service of such a notice was a condition precedent to the lessors' right to increase the rent, and that it was immaterial that the lease purporting to increase the rent was made before the passing of the Act.

The lease contained no covenant by the lessors to supply attendance or the use of furniture, but in fact the lessee had always had the services of a porter and the use of a lift for raising coal and lowering refuse:—

Held, that the flat was not let at a rent which included payment in respect of attendance within s. 12, sub-s. 2, proviso (i.), of the Act.

APPEAL from the Marylebone County Court.

By an agreement in writing dated May 22, 1918, one Edward Michael let to the defendant, Isabella Phillips, a flat, No. 1 on the ground floor of Redesdale Mansions, Hampstead, N.W., at a rent of 107*l.* a year for the term of $1\frac{7}{8}$ years as from May 9, 1918, the landlord paying rates and taxes. This term expired on March 25, 1920, but before its expiration and by lease dated February 17, 1920, the plaintiffs, as executors of Edward Michael, demised the flat to the defendant for a further term of seven years from March 25, 1920, at a rent of 160*l.* a year. By this lease the defendant (therein called "the lessee"), covenanted to pay the rent, the amount payable for rates in excess of the amount payable during the year 1919, and also the sum of 3*l.* 3*s.* per annum for the use and enjoyment with the lessors and others of the grounds in the rear of the demised premises, and 2*l.* per annum for lighting the staircase up to 10.30 every evening; to keep the premises in good tenantable repair, and conform to the rules which might be made by the lessors for the comfort of the tenants; not to make any alteration in the premises without the written consent of the lessors, and not to carry on any trade profession or business thereon; not to "deposit or permit to be deposited any goods parcels cases refuse litter or other obstruction in or upon the staircase yard passage or any other part of the building outside the demised premises," not to "carry or permit to be carried any coal upon the staircase or landing of the said building," and not to "allow tradesmen or others to deliver goods parcels papers or letters except by the lift provided for that purpose." The lessee further covenanted not to assign or

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underlet, and to permit the lessors to enter and inspect the premises.

The lessors covenanted for quiet enjoyment and covenanted to pay the water rate and all other rates taxes and assessments charged on the demised premises except any charges for gas and electric light used therein and except any rates in excess of the amount charged for rates on the demised premises for the year 1919. The lease also contained a proviso for the cesser of the rent in case of destruction or damage by fire and a proviso for re-entry if the rent was twenty-one days in arrear.

There was no covenant by the lessors to provide or maintain a lift or a porter to render any services, but in fact throughout the lessee's occupation, and before that, the landlords or landlord provided a lift and employed and paid a porter who regularly attended to the lift and by means thereof every morning, except on Sundays, removed the tenants' refuse and carried up coals from their cellars from and to a place outside the flat of each tenant.

The standard rent of the flat was 107*l.* 18*s.* a year, but as the rateable value was under 105*l.* a year, the flat was within the Rent Restrictions Act, 1920. The plaintiffs claimed a quarter's rent under the lease due on June 24, 1922. The defendant pleaded the Rent Restrictions Act, 1920, and while admitting liability for 26*l.* 15*s.*, the standard rent for the quarter, she counterclaimed for 125*l.*, as being payments previously made in excess of the standard rent during 1921 and 1922.

The plaintiffs argued: (1.) that the rent received under the lease included payments in respect of attendance and that therefore the premises were outside the Rent Restrictions Act, 1920, having regard to s. 12, sub-s. 2 (i.), of the Act (1);

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17).

Sect. 3, sub-s. 2: "Notwithstanding any agreement to the contrary, where the rent of any dwelling house to which this Act applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks . . . . after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice

and (2.) that in any event they were entitled to the increased rent permitted under the Act.

The county court judge held upon the first point that the premises were within the Rent Restrictions Act, 1920; as to the second point he held on the authority of *Bridges* v. *Chambers* (1) that as no notice of increase had been given under s. 3, sub-s. 2, of the Act (2), the amount of the increase was not recoverable, and he gave judgment for the defendant on the claim and counterclaim.

The plaintiffs appealed.

It is not thought necessary to report the arguments, or the judgments of the Divisional Court, upon the first point. Upon the second point

Hawke K.C. and *Groves* for the plaintiffs. The Rent Restrictions Act, 1920, s. 1, does not prohibit increases of rent made before the commencement of the Act; it is only the excess over the increase permitted by the Act which cannot be recovered. The plaintiffs could not be expected to serve notice of increase in February, 1920, when the lease was granted, because the Act of 1920 was not then in force; nor would such notice have been valid: s. 3, sub-s. 3.

Sect. 3, sub-s. 2, is not retrospective in its effect, its words are "where the rent is increased," not "has been" increased. *Bridges* v. *Chambers* (1) and *Wortley* v. *Mann* (3) were decided under the Act of 1915, s. 1 (vi.), and although the language of that section closely resembles that of the Act of 1920, s. 3, sub-s. 2, the general effect of the two Acts

shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect. . . . . ."

Sect. 12, sub-s. 2: "This Act shall apply to a house or part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—(*a*) in the metropolitan police district . . . . . 105*l*. . . . . and every such house or part of a house shall be deemed to be a dwelling house to which this Act applies: Provided that: (i.) this Act shall not . . . . apply to a dwelling house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture. . . . ."

(1) [1919] W. N. 34; 88 L. J. (K. B.) 500.

(2) See note (1) ante, p. 18.

(3) [1916] W. N. 390.

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widely differs. In the earlier Act no increase of rent at all was permitted.

In *Schmit* v. *Christy* (1) there was a new letting after the Act came into force and therefore that case is distinguishable. In *Goldsmith* v. *Orr* (2) and also in *Raikes* v. *Ogle* (3), where the facts were similar to those in the present case, the landlord was allowed to recover the increased rent to the extent permitted by the Act.

Jardine for the defendant. In any event the plaintiffs cannot recover the increase, because they have never been "entitled to obtain possession": s. 3, sub-s. 1. In other words the landlord could not and has not served the necessary notice to quit. The doctrine that such notice was necessary was affirmed by the Court of Appeal in *Newell* v. *Crayford Cottage Society* (4), and again by the House of Lords in *Kerr* v. *Bryde.* (5)

In the present case, before the first term had expired in March, 1920, the plaintiffs had bargained away their right to possession. Sect. 1 of the Act of 1920 cannot be read alone, it must be read in conjunction with s. 3. *Schmit* v. *Christy* (1) is a binding authority in favour of the defendant.

[He was stopped.]

Hawke K.C. in reply.

BAILHACHE J. [after stating the facts and holding that the appeal failed on the first point, continued]: The practical difficulty in this case is to see how the plaintiffs could have acted so as to entitle themselves to the statutory increase which they now seek to add to the standard rent. They could not at the time when they entered into the new lease to the defendant in February, 1920, have foreseen what would be the provisions of the Rent Restrictions Act, 1920, which did not come into force until July 2, 1920. [His Lordship read s. 1 of the Act and continued:] If that section stood alone, the plaintiffs would be entitled to the

(1) [1922] 2 K. B. 60.
(2) [1920] W. N. 250; 89 L. J. (K. B.) 901.
(3) [1921] 1 K. B. 576.
(4) [1922] 1 K. B. 656.
(5) [1923] A. C. 16.

increases permitted by the Act, but those increases were only permitted in the terms of s. 3, sub-ss. 1 and 2. As regards sub-s. 1, there never was a period in this case during which, but for the Act, the landlord would have been entitled to possession, because although the first lease given to the defendants expired by effluxion of time on March 25, 1920, a new term was created on February 17, 1920, to run from that date; and therefore at no time could the landlord have given the necessary notice to quit. Then by s. 3, sub-s. 2, there must be four clear weeks' notice of increase of rent to expire at a time when the landlord is entitled to obtain possession. Notwithstanding that, I should have agreed with the plaintiffs' view that, where there was a new agreement before the Rent Restrictions Act, 1920, came into force, if the rent reserved by the agreement was in excess of the standard rent, plus the permitted increase, the proper course would be to reduce the new rent to such sum as would be made up by adding the permitted increase to the standard rent. This appears to have been done in *Raikes* v. *Ogle* (1) and in *Goldsmith* v. *Orr* (2), but in neither of these cases was the matter argued, and they cannot therefore be regarded as authorities for that view. Against that view on the other hand is the case of *Bridges* v. *Chambers* (3), decided under the Act of 1915, in which it was held that although there had been a change of tenancy and increase of rent before the Act of 1915 came into operation, that increase of rent could not be insisted upon, because no notice, as was subsequently required by the Act, had been given before the increase of rent was made. The words of the Act of 1915, s. 1 (vi.), differ slightly from those of the Act of 1920, s. 3, sub-s. 2, but in my opinion this difference is not such as to destroy or affect the validity of *Bridges* v. *Chambers*. (3) In *Schmit* v. *Christy* (4) the headnote reads: "A mere agreement with a new tenant will not enable a landlord to recover from him a rent in excess of the standard rent even if the increase is

(1) [1921] 1 K. B. 576.
(2) [1920] W. N. 250.
(3) [1919] W. N. 34; 88 L. J. (K. B.) 500.
(4) [1922] 2 K. B. 60.

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within the limits permitted by the Act." That exactly disposes of the point which counsel for the plaintiffs has tried to make. In *Schmit* v. *Christy* (1) the tenancy in question began after the Act came into operation, but having regard to *Bridges* v. *Chambers* (2) that fact in my opinion makes no difference. In other words, the landlord ought, by some process which I cannot pretend to describe, to have foreseen what was made necessary by a statute which did not come into operation until some months afterwards.

McCARDIE J. [after stating the facts and holding that the appeal failed on the first point continued] : With regard to the second point, I appreciate the argument for the plaintiffs upon the Rent Restrictions Act, 1920, s. 1 ; but it is inadequate, because ss. 2 and 3 of the Act must be read in conjunction with s. 1.

It is now plain upon the cases that a landlord cannot recover an increase of rent unless he becomes entitled to possession and unless he gives due notice of increase as provided in the Act. In *Raikes* v. *Ogle* (3) Acton J. did allow the standard rent plus the permitted increase, although no notice of increase had been given, but there the point was not argued or discussed. The same remarks apply to *Goldsmith* v. *Orr*. (4) Therefore these cases cannot affect our judgments in this case. On the other hand in *Bridges* v. *Chambers* (2), decided under the Act of 1915, which does not on this point differ materially from the present Act, it was held by the Divisional Court that a notice of increase was required even if the rent was increased before the Act of 1915 had been passed ; a similar decision was given by the Divisional Court in *Wortley* v. *Mann* (5) also under the Act of 1915. If there is to be a principle at all in these cases, the principle must apply in the circumstances before us in the present case. Recently a further point has arisen which was not discussed in the earlier cases. In *Glossop* v. *Ashley* (6) it was pointed

(1) [1922] 2 K. B. 60.
(2) [1919] W. N. 34 ; 88 L. J. (K. B.) 500.
(3) [1921] 1 K. B. 576.
(4) [1920] W. N. 250.
(5) [1916] W. N. 390.
(6) [1921] 2 K. B. 451, 456 ; [1922] 1 K. B. 1.

out that before he could get his increase, the landlord must first possess the right to take the premises in his own hands again. This principle, which was laid down both by myself and by the Court of Appeal in that case, was affirmed definitely by the Court of Appeal in *Newell* v. *Crayford Cottage Society* (1), where it was held to be essential that the landlord should have the right to possession before he could impose an increase of rent upon the tenant. The same principle has now been authoritatively stated by the House of Lords in *Kerr* v. *Bryde*. (2) In view of this weight of authority, the onus is upon the plaintiffs to point to a period in which they were entitled to possession. They cannot do so, nor can they point to the service of any notice of increase; it follows that they are not entitled even to that measure of rent which they could have recovered if they had complied with the provisions of the Act and had served the necessary notice.

Appeal dismissed.

F. P. F.

The plaintiffs appealed.

J. B. Matthews K.C. and *Groves* for the appellants. This flat is not within the Rent Restrictions Act, 1920. It is excluded by s. 12, sub-s. 2, proviso (i.), being bona fide let at a rent which includes payment in respect of attendance—namely, the services of the porter. The lease provides that the tenants are not to carry coals up the stairs. That must imply the use of a lift, and it is not to be supposed that the tenants are to work the lift themselves. It is true that attendance is not expressly mentioned in the lease, but the Court will look at the facts of the case, from which it is plain that attendance is furnished in return for the rent.

Secondly, upon the point that no notice in writing of intention to increase the rent was served upon the tenant as provided by s. 3, sub-s. 2, the county court judge would have decided in the appellants' favour but for *Wortley* v. *Mann* (3), *Bridges* v. *Chambers* (4) and *Schmit* v. *Christy*. (5)

(1) [1922] 1 K. B. 656.
(2) [1923] A. C. 16.
(3) [1916] W. N. 390.
(4) [1919] W. N. 34; 88 L. J. (K. B.) 500.
(5) [1922] 2 K. B. 60.

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The last named case is not in point, because there the tenancy began after the Act of 1920. The other two were decided under the Act of 1915. It cannot be that the Act of 1920 imposes a condition of increasing the rent which could not be performed at the date of the increase. On February 17, 1920, when this rent was increased the Act of 1920 had not been passed. The law does not compel a man to do what is impossible : *The Generous* (1) ; *The Beryl* (2); *The Theodore H. Rand* (3); *Rex* v. *Ampthill* (*Parish*) (4); *Reg.* v. *Leicestershire Justices* (5) ; *Mayer* v. *Harding* (6) ; *Anderson* v. *Reid* (7) ; *Wills & Sons* v. *McSherry.* (8) Sect. 3, sub-s. 2, has no retrospective effect ; the words are " where the rent is " —not is or has been—" increased." *Raikes* v. *Ogle* (9) is strongly in favour of the appellants.

Mitchell-Innes K.C. and *Jardine* for the respondent were not called on.

BANKES L.J. This is an appeal from a Divisional Court dismissing an appeal from the Marylebone County Court. The question which the county court judge had to decide was whether the respondent was right in her contention that the landlords had for some time been charging her with, and that she had been paying, rent in excess of what was justified under the Rent Restrictions Act, 1920. The respondent was the tenant of a flat on the ground floor of premises first let to her on May 22, 1918, for $1\frac{7}{8}$ years from May 9, 1918, expiring on March 25, 1920, at a rent of 107*l.* a year. For the purposes of this dispute counsel agreed that the rent charged on that letting was the standard rent of the flat. A month or so before the term expired the landlords granted a lease to commence from March 25, 1920, for seven years at a rent of 160*l.* a year. The Rent Restrictions Act, 1920, did not receive the royal assent until July 2, 1920.

Two questions arise on the construction of that Act. The

(1) (1818) 2 Dod. 322.
(2) (1883) 9 P. D. 4, 137.
(3) (1887) 12 App. Cas. 247.
(4) (1824) 2 B. & C. 847.
(5) (1850) 19 L. J. (M. C.) 209.
(6) (1867) L. R. 2 Q. B. 410.
(7) (1902) 86 L. T. 713.
(8) [1913] 1 K. B. 20.
(9) [1921] 1 K. B. 576.

respondent complained that the rent of 160*l.* was not justified. The landlords seek to justify it on two grounds: first that the Act does not apply to the house at all, because it had been let at a rent which included attendance; and secondly that, inasmuch as the lease was granted before the Act of 1920 was passed and it was therefore impossible for the landlords to conjecture what conditions that Act would impose upon the increase of rent, and consequently impossible for them to perform the conditions which were imposed, therefore they are entitled to exact from the tenant an increased rent without performing those conditions.

The first point is a question of fact which ought to be decided upon the terms of the lease. The lease after describing the premises and stating they were let at a rent of 160*l.* went on to provide that the tenant was not to use the stairs for the purpose of carrying up coals, but contained no reference to any provision by the landlords of a porter or the services of a porter. The county court judge held on the construction of the lease that there was no covenant by the landlords to provide a porter or to include the services of a porter among any of the landlords' obligations. The case for the landlords was that from the beginning of the respondent's tenancy in May, 1918, there had in fact been a porter in attendance who on week days, but not on Sundays, performed services for the tenants of the flats, working the lift to lower ash pans, filling the tenants' coal scuttles and raising them to the level of their apartments. In the Divisional Court McCardie J. took the view that there was no evidence of any usage between the parties which entitled the respondent as of right to this attendance or these services. Be that as it may, I have come to the conclusion that the view of the county court judge upon the construction of the lease and of the statute was correct, that a dwelling house let at a rent which includes payment in respect of attendance has reference to attendance which the landlord is to provide by the terms of the lease. Mr. Matthews argued strenuously that the facts of the case must be considered without regard to the obligations in the lease and that if the rent of the tenement in fact

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covered attendance then it ought to be held that the case came within proviso (i.) to s. 12, sub-s. 2. I cannot agree. On the plain construction of the proviso it applies only to board, attendance, and use of furniture which as between the landlord and tenant the landlord has contracted to provide.

Upon the second point it is said truly that the landlords in view of the dates and facts could not have given the notice required by s. 3, sub-s. 2, as a condition precedent to the increase of rent permitted by s. 2. Mr. Matthews insisted forcibly that this case fell within the rule that the law does not compel to impossibilities and he referred to many cases upon that point. I need only refer to *The Generous* (1), where proceedings were taken to confiscate a ship for an infringement of the revenue laws. The defence was that the law in question requiring that the ship should have a British master could not be complied with because no such person could be found at the port of loading. If a condition is imposed by statute and the breach of it is punishable as a crime it may be an answer to a criminal charge to prove that performance of the condition was impossible. This case is quite different. Here the landlord who performs certain conditions is allowed what some would call an indulgence and others an act of justice; but whatever it is called, it is conferred upon those landlords who are in a position to comply and do comply with the statutory conditions, and the answer to Mr. Matthews' argument is that if the appellants cannot comply with the statutory conditions they cannot avail themselves of the statutory benefit. It is only necessary to look at s. 2 of the Act of 1920, which defines the amount by which the standard rent may be increased, and then at s. 3, which imposes conditions upon the landlord's right to recover the permitted increase. The conditions are of two kinds; one relates to the time during which the increase may be recovered: "Nothing in this Act shall be taken to authorize any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . . ." It has been held in the House

(1) 2 Dod. 322.

of Lords in *Kerr* v. *Bryde* (1) that in order to comply with this condition the landlord must have given notice to quit unless the tenant's right to possession has come to an end by effluxion of time or other reasons without the necessity of a notice. Then sub-s. 2 imposes other conditions which, assuming the tenant's right to possession has come to an end, must have been performed by a landlord before he can recover the increased rent. He must have served a valid notice in the statutory form, which is carefully framed so as to indicate to the tenant the grounds on which the landlord seeks to justify the increase. This has not been done. Mr. Matthews pleads that it has not been done because it could not have been done. Be it so; as it has not been done the appellants are not entitled to the benefit of the Act. The county court judge and the Divisional Court have come to the right conclusion, and the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. It is said this dwelling house is not within the Act because it was let at a rent which includes payment in respect of attendance. The facts are that certain services were rendered by a porter. I will assume that this constituted attendance; but nothing was said in the lease about this attendance. It was supplied either voluntarily or in the hope of attracting tenants. The rent does not in fact include payment in respect of it.

The second and more difficult question is whether the landlords are entitled to the increases which under certain conditions are permitted above the original standard rent. First, has the rent been increased since March 25, 1920, within s. 1 of the Act of 1920? The second term of the respondent's tenancy began at an increased rent on March 26 under a lease made before that date, but a decision of this Court, *Goldsmith* v. *Orr* (2), compels us to hold that the rent has been increased since March 25. Now if the amount of a permitted increase comes in question that amount is specified in s. 2, but before any increase at all can be made the conditions of s. 3 must be complied with. By sub-s. 1: "Nothing in

(1) [1923] A. C. 16. (2) [1920] W. N. 250; 89 L. J. (K. B.) 901.

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this Act shall be taken to authorize any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . . ." There are weekly, monthly, and yearly tenancies which require notice to quit. In these cases before the standard rent can be increased notice to quit must be given: *Kerr* v. *Bryde*. (1) In other cases there may be a period during which but for the Act the landlord would be entitled to obtain possession without any notice to quit. The tenancy may expire by lapse of time, and then a period commences during which, but for the Act, the landlord would be entitled to obtain possession. He may obtain an increase of rent during that period, upon condition. The condition is that he shall have served upon the tenant a valid notice in writing of his intention to increase the rent. My impression is that by serving such a notice he may entitle himself to recover a permitted increase beginning to accrue on the expiry of four clear weeks after the service, provided the four weeks is a period during which but for the Act the landlord would be entitled to obtain possession; that is to say that in the present case though the landlords could not recover any increase for the first portion of the tenancy, not having known and so not having performed the conditions for recovering the permissible increase, yet after they did know them they would have been entitled to give the prescribed notice, and four clear weeks after service thereof begin to be entitled to the permitted increase. But that point does not arise in this case because the landlords have not served the prescribed notice.

This is fatal to their appeal. A notice in writing of intention to increase the rent must be served upon the tenant. It must be in the form contained in the First Schedule to the Act, or in a form substantially to the same effect; that is to say, it must inform the tenant of the way in which the increase is made up so that he can see whether the proposed increase is justified by the Act. The appellants have never done this. Mr. Matthews says it was impossible for them to do it, and cited various cases in which the Court

(1) [1923] A. C. 16.

has dispensed with performance of an act where performance of it has been impossible. They have little or no bearing on the present case. It is said that to bind a landlord by conditions which he could not have known of is retrospective legislation, but it is clear that these statutes were in many instances intended to be retrospective, and to invalidate acts which were perfectly legal when they were done. The Act of 1915, which was passed on December 23, 1915, invalidated agreements for increase of rent above the standard rent since August 4, 1914, with the exception of rent accrued due before November 25, 1915, and the other exceptions mentioned in that Act. The Act of 1920, passed on July 2, 1920, invalidated increases of rent since March 25, 1920, with the exceptions mentioned in s. 2. Therefore the objection that before the passing of the Act of 1920 it was impossible to perform the conditions imposed by that Act does not stand in the way.

Sect. 2, sub-s. 3, provides that a notice served before the passing of the Act of an intention to make any increase of rent which is permissible only by virtue of the Act, shall not be deemed to be a valid notice for the purpose of the section. It does not seem to affect this case beyond furnishing another instance of retrospective legislation. It is not necessary to go through the various authorities in order to arrive at the conclusion that this appeal must be dismissed.

ATKIN L.J. I agree. It is enough to say that in my opinion the judgments of the Divisional Court are right and that I agree with the reasons given by my brothers for affirming them.

Appeal dismissed.

Solicitors for appellants: *Newman, Paynter, Gould & Co.*
Solicitors for respondent: *Steavenson & Couldwell.*

W. H. G.

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July 25.

[IN THE COURT OF APPEAL.]

PORT OF LONDON AUTHORITY *v.* WOOLWICH CORPORATION.

Rates—Metropolis—General District Rate—Partial Exemption of Land covered by Water—Continuation of Exemption—Dock coming into Existence as a rateable Hereditament after 1901—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 211 (1.) (*b*)—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *ss.* 10, 15, 16, 19.

Before 1900 general district rates were made in Woolwich under the Public Health Act, 1875. By s. 211 (1.) (*b*) of that Act occupiers of land covered with water were to be assessed upon one-fourth part only of the net annual value thereof. By the London Government Act, 1899, s. 10, it was enacted that a scheme under that Act should provide for protecting the interests of owners and occupiers of any hereditament exempted from any rate or liable to be assessed thereto at a less amount than other hereditaments. Sect. 19 enacted that a scheme under the Act should provide for placing Woolwich under the general laws applicable to metropolitan boroughs and for the repeal of the application thereto of the Public Health Acts. The appointed day for applying the general law of rating in metropolitan boroughs to Woolwich was April 1, 1901. In 1912 the Port of London Authority commenced the construction of a new dock in Woolwich. In 1922 they were rated to the general district rate as owners and occupiers of the said new dock upon the full annual value thereof to the full amount of the rate. The Port of London Authority appealed against the rate to the Quarter Sessions, who dismissed the appeal and stated a case for the opinion of the King's Bench Division of the High Court upon the question whether the appellants were liable to be assessed to the general rate in respect of the said new dock, in so far as it consisted of land covered with water, upon the full net annual value thereof, or were entitled to such partial exemption as aforesaid.

The Divisional Court held that by the combined effect of the London Government Act, 1899, and schemes operating under it, the partial exemption of land covered with water was preserved, and that the appellants were liable to be assessed upon one-fourth part only of the annual value of such land, notwithstanding that the new dock had only come into existence as a rateable hereditament after 1901 :—

Held, on appeal, that the partial exemption only applied to land which was covered with water before 1901, and did not extend to a hereditament consisting of land which had become covered with water since that date. The new dock was therefore liable to be assessed to the general rate at the full rateable value thereof.

Appeal from the decision of a Divisional Court (Lord Hewart C.J., Shearman and Branson JJ.) upon a case stated by Quarter Sessions for the county of London. The

Court of Quarter Sessions had dismissed an appeal by the Port of London Authority against a general rate for the metropolitan borough of Woolwich made on April 3, 1922, subject to the opinion of the King's Bench Division upon the following case :—

1. The Appellants are owners and occupiers of a certain hereditament in the Parish and Metropolitan Borough of Woolwich and in a general rate made by the Respondents under the London Government Act 1899, on the 3rd April 1922 the Appellants were rated as the occupiers of the said hereditament under one entry in the said rate. . . . . The Appellants are rated in respect of the said hereditament upon the full net annual value thereof to the full amount of the said rate.

2. The dock and appurtenances thereto of which the said hereditament forms part is known as the King George V. Dock. The construction of the said dock which was authorized by the London and India Docks Company (New Works) Act 1901 (1 Ed. VII. Ch. CCXXVII) was commenced during the month of August 1912 and the said dock and appurtenances therefore came into existence as a rateable hereditament after the 1st April 1901.

3. The said hereditament included in and intended to be rated under the said entry appearing in the said rate consists in part of land covered with water.

4. Before the coming into operation of the London Government Act 1899 and the schemes made thereunder and hereinafter referred to the general district rate was made and levied under the Public Health Acts in the Parish of Woolwich, which now forms part of the Metropolitan Borough of Woolwich. Land covered with water was under the said Acts assessable to the general district rate in the proportion of one fourth part only of the net annual value thereof.

5. Under Sections 15 and 16 of the London Government Act 1899 a Committee of the Privy Council may make orders and schemes for carrying the said Act into effect. Under Section 16 of the London Government Act, 1899 the provisions of the Municipal Corporations Act, 1882 are applied

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with the necessary modifications to any scheme under the London Government Act. By Section 213 and paragraph 9 of the 7th Schedule of the Municipal Corporations Act 1882, a scheme when confirmed by Parliament or by Order in Council is deemed to be duly made and within the powers of the Act. The orders and schemes hereinafter mentioned have been duly made and confirmed under the London Government Act 1899. The said orders and schemes are annexed to and are to be deemed to be part of this Case.

6. By section 19 of the London Government Act, 1899 it is enacted as follows :—

> " (1.) A scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts, 1855 to 1893, and other enactments applying to London.
>
> " (2.) Subject to the provisions of any such scheme, this Act shall apply to Woolwich in like manner as if the local board of health thereof were an administrative vestry."

7. By Section 4 of the London Government Act, 1899 the powers and duties of the vestry are transferred to the borough council, and by section 10 (1.) of the said Act it is provided that " a scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments."

8. By the London (Woolwich) Scheme 1900, which was confirmed by an order in council, on the 7th day of August 1900, it is provided as follows :—

> " 1. (2.) This scheme shall have effect subject to the provisions of any future scheme made under the

Act, and in particular to the provisions of any such scheme making provision for the protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments.

"2. Subject to the provisions of this scheme the general law applying to metropolitan boroughs shall as from the day on which the first borough councillors elected under the Act came into office, apply within the parish of Woolwich in like manner as it applies to the rest of London and accordingly the Public Health Acts and the other enactments not applying to London shall, as from that date, and so far as they apply to the Parish of Woolwich be repealed, and the Metropolis Management Acts, 1855 to 1893, and the other Acts applying to London, so far as they do not before that date apply to the parish of Woolwich, shall apply to that parish in like manner as they apply to the rest of London.

Provided that :—

"(A) Nothing in this section shall affect the nature of any rate to be levied in the Parish of Woolwich between the said day and the 31st day of March 1901, and in the meantime sections 207 and 209 to 227 of the Public Health Act, 1875, shall continue to apply to Woolwich as if the council of the metropolitan borough of Woolwich was the council of an urban district outside London, and the Parish of Woolwich was a parish in that district."

9. By the London (Rating) Scheme 1901, which was confirmed by an order in council on the 9th day of March 1901, it is provided as follows :—

"2. (1) In levying the general rate after April 1, 1901, effect shall be given to any exemption to any existing rate (whether that exemption is given by

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way of reduced assessment or by levying a differential rate in the pound or in any other manner) by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists, or in the case of a total exemption equal to the whole amount so produced . . . . . (2.) Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of hereditaments are entitled to any exemption, the council of that borough shall apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which there is such an exemption, and shall enter the rates in the pound so apportioned in the heading of the rate, and the rates in the pound so apportioned and entered shall be treated as levied for the purposes in respect of which the exemption exists.

"6. For the purposes of this scheme the expression 'existing rate' means any rate leviable in a metropolitan borough before the first day of April 1901.

"7. (1.) This Scheme may be cited as the London (Rating) Scheme 1901 and shall have effect subject to the provisions of any future scheme and to the provisions of any scheme dealing with any particular exemption from rates or liability to be assessed."

10. In regard to the question of fact that has been raised we were of opinion that this was a new dock altogether and properly rateably assessed as a separate hereditament.

In regard to the question of law raised before us, we were of opinion that as the said hereditament came into existence after the 1st April 1901 the exemptions continued in the

London Government Act, 1899 and the Schemes made thereunder do not apply and we dismissed the Appeal.

11. The Appellants contend—

(A) That the combined effect of the London Government Act 1899 and the orders and schemes made thereunder is that the partial exemption of land covered with water from the general district rate formerly levied in the Parish of Woolwich is preserved and applies to all hereditaments of the exempt class irrespective of the date at which they came into existence.

(B) That the Appellants in respect of the hereditament concerned in this Appeal in so far as it consists of land covered with water are entitled to a partial exemption, as to so much of the said general rate as is made for the purposes for which the general district rate was made before the commencement of the operation of the London Government Act, 1899 and the said orders and schemes and that a proportionate part (corresponding to the said partial exemption) should be deducted from the total amount of the said general rate which would otherwise be payable by the Appellants in respect of the said hereditament.

12. The Respondents contend that the Appellants were liable to be assessed to the said rate in respect of their land covered with water upon the full net annual value for the following reasons :—

(A) Because Sec. 211 of the Public Health Act 1875 was, from the 1st November 1900, repealed in its application to the Parish of Woolwich by Sec. 19 of the London Government Act 1899, and the London (Woolwich) Scheme 1900 made thereunder and the said exemption was not preserved by the said Act nor by any scheme made thereunder.

(B) Because the London (Woolwich) Scheme 1900 provides that Sections 207 and 209–227 of the Public Health Act 1875 shall continue to apply to the

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Parish of Woolwich to March 31, 1901, only, and does not provide that those sections shall continue to apply to the said Parish after the said date.

(C) Because the exemptions preserved by the London Government Act 1899 and the Schemes made thereunder are such exemptions only as were, prior to the operation of the said Act and Schemes, in operation throughout the Metropolis as a whole.

(D) Because even if the said partial exemption was preserved by the said Act and Schemes it has no application to hereditaments which first came into existence after the 1st April 1901 and therefore does not extend to the hereditament concerned in this Appeal.

(E) Because by reason of Clauses 2 (1.) and 6 of the London (Rating) Scheme 1901 the said partial exemption was only preserved (if at all) in so far as it applied to any "existing rate" i.e. any rate leviable before the 1st April 1901 and does not extend to any rate made after the said date including the rate appealed against herein. The Parties referred to the case of The London & India Dock Company v. Borough of Woolwich 1902. (1)

13. It is agreed between the Appellants and the Respondents that if the Appellants' contentions are correct the amount to be deducted from the total amount of the said general rate which would otherwise be payable by the Appellants in respect of the said hereditament is 459*l.* 7*s.* 6*d.*

14. The question for the opinion of the Court is whether the Appellants are liable to be assessed to the said general rate in respect of the said hereditament in so far as it consists of land covered with water upon the full net annual value thereof or are entitled to such partial exemption as aforesaid.

15. If the Court shall answer the aforesaid question in favour of the Respondents the decision of the Quarter Sessions is to stand.

If the Court shall answer the aforesaid question in favour

(1) [1902] 1 K. B. 750.

of the Appellants the said general rate is to be amended in accordance with the Appellants' contentions and so as to give effect to the agreement as to figures in paragraph 13 of this Case.

For the London Quarter Sessions
(Signed) ROBERT WALLACE,
Chairman.

The Divisional Court held, that by the combined effect of the London Government Act, 1899, and schemes operating thereunder, the partial exemption of land covered with water was preserved, and that the appellants (the Port of London Authority) were liable to be assessed upon one-fourth part only of the annual value of the dock notwithstanding that it had only come into existence as a rateable hereditament after 1901.

The respondents (the Corporation of Woolwich) appealed.

Macmorran K.C. and *S. G. Turner* for the appellants.

Talbot K.C. and *E. H. Tindal Atkinson* for the respondents.

[The arguments sufficiently appear from the judgments of the Court.]

LORD STERNDALE M.R. This is an appeal from the Divisional Court which reversed a decision of the London Sessions. The question is whether the Port of London Authority are entitled to certain exemptions in respect of a portion of the new King George V. Dock, which portion is within the Borough of Woolwich. Woolwich was originally not within the metropolis. It did not come within the metropolis until 1899, when the London Government Act of that year was passed. Sect. 15 of that Act provides for the appointment of Commissioners "to prepare such Orders and schemes as are required for carrying this Act into effect, and the Committee"—that is the Committee of the Privy Council—"may settle the Orders and schemes so prepared, and may employ such persons as they may deem necessary for the purposes of this Act," and so on. Then s. 19, sub-s. 1, says: "A scheme under this Act shall provide for placing

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Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts, 1855 to 1893, and other enactments applying to London." The relevancy of the Public Health Acts is that by s. 211 of the Act of 1875 land covered by water is entitled to certain exemptions from rating. Sect. 10, sub-s. 1, of the Act of 1899 provides: "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers' rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments." Now this dock was not in existence in 1899—it was made some considerable time after that. With regard to docks—that is to say, land covered with water—which were in existence and in that condition before the Act of 1899 was passed, it was decided in 1902 by a Divisional Court in *London and India Docks Co.* v. *Borough of Woolwich* (1) that that exemption still continues by virtue of the Act of 1899, the provisions of which I have read. Also, I will not say by virtue of but consistently with the schemes which were made under that Act, the London and India Docks Company now forms part of the undertaking of the Port of London Authority, and therefore technically perhaps it may be said the Port of London Authority are not the same persons as were the litigants in 1902; but they have taken over the undertaking of the London and India Docks Company. I wish to reserve the question whether the Corporation of Woolwich were at liberty to challenge the decision given against them in 1902, from which they did not appeal. I am not satisfied that they are. I only wish to reserve my opinion upon that, because it is immaterial in the view I take of the matter. I think that the decision of that Divisional Court in 1902, and the

(1) [1902] 1 K. B. 750.

decision of the Court from which this appeal comes on that point—namely, that in regard to docks, that is to say, land covered with water existing at the time of the passing of the Act, the exemption which was given to them still continues, is correct. But there is another point in this case. Does that exemption—I will not say continue, because it was not in existence—but is that exemption to apply to land which was not covered by water at the time of the passing of the Act, but which has since been brought into that condition? In other words, does it apply to a new dock made after the passing of the Act? That depends upon s. 10, sub-s. 1, of the Act of 1899, to which I have referred, and upon the scheme which was in fact made under that section. It also depends upon the scheme made in respect of Woolwich. The Woolwich scheme provides: "This scheme shall have effect subject to the provisions of any future scheme made under the Act, and in particular to the provisions of any such scheme making provision for protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments." The latter part of that scheme repeats the language of s. 10, sub-s. 1, of the Act of 1899, except that it uses the words "hereditaments are" instead of "hereditament is," as in the Act. Then the scheme goes on: "Subject to the provisions of this scheme the general law applying to metropolitan boroughs shall, as from the day on which the first borough councillors elected under the Act come into office, apply within the parish of Woolwich in like manner as it applies to the rest of London, and accordingly the Public Health Acts and the other enactments not applying to London shall, as from that date, and so far as they apply to the parish of Woolwich be repealed, and the Metropolitan Management Acts, 1855 to 1893, and the other Acts applying to London, so far as they do not before that date apply to the parish of Woolwich, shall apply to that parish in like manner as they apply to the rest of London. Provided that nothing in this section shall affect the nature of any rate to be levied

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in the parish of Woolwich between the said day "—November 1—" and the 31st day of March, 1901, and in the meantime sections 207 and 209 to 227 of the Public Health Act, 1875, shall continue to apply to Woolwich as if the council of the metropolitan borough of Woolwich was the council of an urban district outside London, and the parish of Woolwich was a parish in that district." The intention therefore was this, that in November Woolwich should come into the metropolis and form part of a metropolitan borough, but that between November 1 and March 31, 1901, the Public Health Act should continue to apply and Woolwich should remain in the position that it was in before, so far as that is concerned. That is the Woolwich scheme.

It is argued on behalf of the Corporation that that is the only scheme which applies to Woolwich at all, and that although it is expressed to be subject in particular to any scheme for protecting the interests of owners and occupiers in the way I have mentioned, no such scheme has ever come into existence, and therefore there is nothing which applies this exemption to any docks made after the passing of the Act. On the other hand, it is contended by the respondents that what is called the Rating Scheme of 1901 is such a scheme as is contemplated by the Woolwich scheme, and that the words of that scheme, whatever may be the meaning of the Act of Parliament, are sufficient to give the exemption in respect of this dock, although it was not made until after the time I have mentioned. Now taking the words of the Act first I do not think that a new dock does come within the words of the section, and I do not think that the owners or occupiers of a dock not in existence at the time I have mentioned are persons whose interests have to be protected under s. 10, sub-s. 1, of the Act. [The Master of the Rolls read the sub-section again.] That is not to protect the interests of any person who may come into the borough of Woolwich and bring into existence a hereditament which would be exempt under s. 211 of the Public Health Act, 1875, nor is it, so far as I can see, a provision to protect the interests of a class of hereditaments, which is the view taken by some

of the members of the Divisional Court. It is to protect the interests of owners and occupiers of any hereditament which is exempt from any rate. Now this hereditament was not at that time exempt, and it therefore does not in my opinion come within the meaning of s. 10, sub-s. 1, of the Act, and the owners and occupiers of the hereditament, speaking at the time of the Act, are not exempt from any rate or liable to be assessed at a lower rate. I do not know that it was very strongly opposed, but it was said that does not matter, because when you look at the scheme of 1901—the Rating Scheme—you will see that whether the Commissioners who drew up the scheme were obliged to extend it to docks which came into existence in the future or not, they have done so. Of course if the appellants' contention that this scheme has nothing to do with the Woolwich scheme is correct, it does not matter what the Commissioners of this scheme said; but assuming that this scheme is to be taken to be the one to which the Woolwich scheme is subject, it does not seem to me that this scheme does what it is said to do—namely, to say that for the future—because this is what it comes to—any class of hereditament which is exempted by the Public Health Act from rating either wholly or in part shall, although it comes into existence after the passing of the Act, be exempt. Clause 2 (1.) of the London (Rating) Scheme, 1901, says: "In levying the general rate after April 1, 1901, effect shall be given to any exemption from any existing rate . . . . by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part," and so on. Now I turn to see what the "existing rate" is. In clause 6 I find this: "For the purposes of this scheme the expression 'existing rate' means any rate leviable in a metropolitan borough before April 1, 1901." Now was this hereditament one which was entitled to exemption from an existing rate so defined? It seems to me it was clearly not. I do not think these words can be twisted in order to cover a hereditament which at that time was not exempt from any existing rate as so defined.

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I have some doubt whether this was intended to deal with this particular class of case at all, but I will assume that it is included. It does not seem to me that these words carry the matter any further than do the words of s. 10 of the Act, and I do not think they have this effect, that an exemption from an existing rate must be construed as meaning some class of hereditaments either now in existence or to come into existence, which, if they had come into existence in a certain form, would have been entitled to an exemption from an existing rate. It seems to me that that is twisting and indeed altering the sense and meaning of the words, and that the argument founded upon clause 2 of s. 1 is ill founded. For these reasons, although I agree with the Divisional Court upon the first point I respectfully differ from them on the second, and I think on that point the appeal should be allowed.

WARRINGTON L.J. The question raised in this appeal is whether the Port of London Authority, as the owners and occupiers of the King George V. Dock at Woolwich, which was constructed since the coming into operation of the London Government Act, 1899, are entitled to be exempt from so much of the general rate as represents what was previously the general district rate in respect of that dock as being land covered with water. At the time of the passing of the Act of 1899 the occupiers of land covered with water in Woolwich were entitled to be exempt from the general district rate to this extent—they were entitled to be assessed in respect of such lands on one quarter instead of on the whole of their annual value. They enjoyed that exemption by virtue of the application to Woolwich of a section of an Act then in force—s. 211 of the Public Health Act, 1875. The first question raised on the appeal is whether the exemption which the occupiers of land in Woolwich answering that description enjoyed at the date of the passing of the Act of 1899, was continued by the schemes made under the provisions of that Act. That question came before a Divisional Court in *London and India Docks Co.* v. *Borough of*

Woolwich. (1) The question whether the exemption still continued was there decided in the affirmative by a Court consisting of Lord Alverstone C.J., Darling and Channell JJ. We are now invited by the Corporation of Woolwich to overrule that decision. I doubt whether the Corporation are entitled to question that decision in the present litigation, seeing that the Port of London are the successors of the body that was the litigant with the Corporation in the year 1902; but whether that be so or not, in my opinion, the decision of the Divisional Court in that case, followed as it has been by the Divisional Court in this case, was right, and the reasons given by both those Courts were also, in my opinion, right. I need say no more upon that point.

The second question, which did not arise in 1902, is whether the exemption is enjoyed in respect of a dock constructed since the Act of 1899—between then and the coming into operation of the scheme made under it. The Divisional Court in this case have decided that the exemption does apply. In my opinion the view expressed by Channell J. in *London and India Docks Co.* v. *Borough of Woolwich* (1) to which I have referred is the correct view. Channell J. in that case said: "In my view, so far as any future hereditaments are concerned—that is if a new dock is made in Woolwich—it is intended that the general law shall apply to those hereditaments. I understand the meaning and intention of s. 10, sub-s. 1, of the London Government Act, 1899, and of the scheme under that Act, to be to prevent the particular persons in Woolwich, who were the owners or occupiers of hereditaments to which the exemption applied, from being rated any higher in the future. It is for that reason that I do not think that our present decision that the partial exemption of these appellants' premises continues is in any way contradictory to the express enactment, in s. 19, sub-s. 1, that Woolwich should be placed under the general law applying to metropolitan boroughs. I think that Woolwich is placed under the general law applicable to the metropolis with regard to the future, and that if any new dock is made it will

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come under that general law." That question turns upon the construction of one section of the Act of 1899, and on the provisions of the London (Rating) Scheme of 1901, which was one of the schemes made under the provisions of that Act. Sect. 10, sub-s. 1, of the Act provides: "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers' rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments." I may observe in passing that at the date of the passing of this Act there were a variety of rates —a separate sewers' rate and a separate lighting rate are mentioned in the section—and amongst other rates which were merged in the general rate was the general district rate in respect of which the exemptions were enjoyed in Woolwich. That was not the only rate in respect of which there were exemptions, but it is that alone with which we have to deal. The London (Rating) Scheme of 1901 was the scheme contemplated by s. 10 of the Act of 1899. That provided by clause 1 (1.): "Subject to the provisions of this scheme as from April 1, 1901, all money to be raised by rates to meet the expenses of the council of every metropolitan borough, including the sums of money required to be levied by any precept on the borough council, shall be paid out of the general rate, and a separate sewers' rate and a separate lighting rate shall not be levied." Then 2 (1.) provides: "In levying the general rate after April 1, 1901, effect shall be given to any exemption from any existing rate (whether that exemption is given by way of reduced assessment or by levying a differential rate in the pound or in any other manner) by means of the deductions from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists, or, in

the case of a total exemption, equal to the whole amount so produced." In the first place s. 10, sub-s. 1, of the Act uses the expression "for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate," and so on. It seems to me that that expression ought to be interpreted as being confined to hereditaments which at the time of the passing of the Act were exempt from any rate. The words have no reference at all to hereditaments which were not at that time exempt from any rate but might from change of circumstances become exempt in the future. But I will assume that Mr. Talbot is correct when he says that it was competent for those who framed the scheme to protect not only the occupiers of hereditaments which at the date of the passing of the Act were exempt from any rate but to protect the occupiers of hereditaments which in consequence of circumstances subsequent to the passing of the Act would have become exempt if it had not been passed. To see whether they have done that it is necessary to look again at the provisions of the scheme of 1901. The material words of that scheme are: "Effect shall be given to any exemption from any existing rate"—that is, exemption from any rate existing at the time. Can it be said of the exemption now claimed that it is to be treated as an exemption from the general district rate? The general district rate no longer exists. It is an exemption which might have taken effect if the conditions had continued under which the general district rate was a rate which had to be levied, but, in my opinion, it cannot be said that occupiers of land which is now covered with water but which was not covered with water at the date of the passing of the Act, can be treated as enjoying an exemption from a rate existing at a previous date, but which has now long since been abolished. Then again, if reliance is placed upon s. 2, sub-s. 2, and the words in it, "or any class of hereditaments," I think that is not sufficient to alter the construction of sub-s. 2 of s. 1. The words of s. 2, sub-s. 2, of the London (Rating) Scheme, 1901, are these: "Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of

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hereditaments are entitled to any exemption." The contrast is between hereditaments which enjoy some special exemption applicable to themselves only and those which enjoy an exemption as belonging to a class of hereditaments; that is to say—and I suppose those coming under the latter description would be included in it—land covered with water. But it does not by any means follow from that that a wider interpretation is to be given to the previous sub-section than that which would confine the exemption to the occupiers of the hereditaments which enjoyed it at the time the Act came into force.

On the second point on the whole I disagree with the judgments of the Divisional Court, and I think that in the result this appeal ought to be allowed.

SCRUTTON L.J. Two points have been relied on in this appeal. The state of facts out of which the dispute arises is that in the borough or district of Woolwich before 1899, land which was covered by water, such as the water area of a dock, only paid one-quarter of the general district rate—that is to say, it was exempted from three-quarters of that rate. Changes took place in the relations of the borough or district to the metropolis, and the question now is whether the legislation which effected those changes has continued the exemption in the case of land which in 1899 was not covered by water but which has since 1900 become land covered by water. First of all it was argued that it does not make any difference whether this land was or was not covered by water in 1899. The original exemption of land covered by water, in the borough or district of Woolwich, has gone. Secondly, it was said that if that exemption is continued at all it is only continued in the case of land which was in 1899 covered by water and does not apply to land like the present, which became covered by water after 1900.

The first point raised here was not discussed in the Court below, because that Court was bound by a previous decision of the Divisional Court in regard to that matter—a decision to the effect that in the case of land covered by water in

1899 the exemption did continue. But that point has been argued here. Mr. Talbot for the Port of London Authority did, in one or two sentences, take the objection that as between these two parties that point was not now arguable; but he did not press his objection, because, apparently, he was so confident in the merits of his main point. But as the matter affects other cases than this I desire to say that I have the gravest doubt whether as between these parties the point can be argued again. The Port of London Authority are the successors of the London India Docks Company, who were one of the litigants in the case, and the Borough of Woolwich is the other. In the previous case the question asked was: "Are the appellants liable to be assessed to the General Rate in respect of land covered by water upon the full net value thereof or are they entitled to a partial exemption"? which is exactly the question stated in this case. I have always been under the impression hitherto that the law is correctly stated in the notes to the *Duchess of Kingston's Case* (1): "It is clearly established that it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision when the time for appealing has passed. If the decision was wrong it ought to have been appealed from in due time." Then certain authorities are cited for that. It is not necessary to decide the case finally on that ground, but I do not desire the fact that we heard this point argued to be taken as any authority in the future for the proposition that two parties who have fought a case once and got a decision which was not appealed from can turn up ten years later and fight the same question over again with a view of taking the matter higher. On the merits of the case on this point it appears to me that the previous Divisional Court decision was correct. A change was made in the position of Woolwich under the London Government Act, 1899, and there was a provision in that Act in regard to any schemes which were framed under the Act for defining the relations of boroughs to the metropolis and their position in regard to rating. The words of s. 10,

(1) (1776) 2 Smith's L. C., 12th ed., 754, 772.

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sub-s. 1, of the London Government Act, 1899, are: "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the General Rate, and for the discontinuance of a separate sewers' rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments." That was an obligation—it was not something permissive. There is also a special clause in s. 19 applicable to Woolwich: "A scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs." The machinery by which that was to be carried out is a little odd. First of all the Woolwich order was made on August 7, 1900. That provided that subject to the provisions of the scheme, the Public Health Acts so far as they applied to the Borough of Woolwich should be repealed. The provisions as to exemption in the case of land covered by water was one of the parts of the Public Health Act, 1875, which was repealed, but the repealing was subject to the provisions of the scheme, and one of the provisions of the scheme was: "This scheme shall have effect subject to the provisions of any future scheme made under the Act and in particular the provisions of any such scheme making provision for protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a rate lower than any other hereditaments." I should have thought myself that the scheme itself ought to have contained a term which complied with the obligation in s. 10, sub-s. 1, of the Act; but what the draftsman did was to make the scheme say that it is subject to the provisions of any future scheme, and it may be that that is enough. The future scheme, in my view, which is contemplated by s. 1, sub-s. 2, of the Woolwich order was what is called the Rating Scheme of March 9, 1901. That Rating Scheme provided that in levying the General Rate, which was to replace the General District Rate, "effect shall be given to any exemption from any existing rate"—and "existing rate" is defined as a

"rate leviable before April 1, 1901." Now the result of that appears to be certainly this—namely, that if you could show that before April 1, 1901, you were an occupier of a hereditament in Woolwich which was exempt by reason of the provisions of the Public Health Act, you could claim after April, 1901, exemption from the General Rate to the same extent as you had it before, so long as your conditions of exemption continued. That I understand to be the point which was decided by the Divisional Court in 1902, which appears to me to have been correctly decided. Therefore, quite apart from the question as to whether it was open to the Borough of Woolwich, having failed once and allowed their time for appealing to expire, to come again ten years later and argue the same point, I think when they do come and argue the point it is a bad point, and that this point, therefore, fails.

The second question is that which was argued before the Divisional Court, and which I personally regard as one of considerable difficulty. It is impossible to avoid seeing that owing to the legislation prevailing in Woolwich before 1899, land which was not being used for any of the purposes which gave exemption from three-quarters of the rate had yet a value arising from the exemption, in that if it was used for those purposes there would only have to be paid in respect of it quarter rates instead of whole rates. And I cannot help seeing that that was a circumstance which undoubtedly would give an extra value to the land. A person wanting to make a dock or a railway or a market garden would know when he bought his land in Woolwich, land which was not at that time being used for any of those purposes, that if he did use it for any of those purposes so long as that legislation continued he would at once get out of paying three-quarters of the General District Rate. I can quite see that that is a matter which might be provided for by a scheme, and that it is for the scheme to make provision for protecting the interests of those persons. It is quite possible that the persons who framed the scheme might say: If the landowner uses his land for particular purposes he will

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get a remission of three-quarters of the General District Rate. But whilst I see that what I have to look at is not what would have been a reasonable scheme to make, but what has in fact been done. The direction in s. 10, sub-s. 1, of the Act of 1899 is to "make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate," and so on. I think the most natural reading of those words is "which is now exempt"—not "which will be exempt if something happens in the future which has not yet happened." Whilst I do not suggest that Mr. Talbot admitted that, at any rate, he thought that there was sufficient in it to fortify himself by the suggestion that while that might be so yet the scheme might contain incidental, consequential or supplemental provisions, and that the incidental, consequential or supplemental provisions might include provisions for the future happening of an event which would render the land exempt when it happened. But when one goes on to see how s. 10 was complied with or endeavoured to be complied with by the scheme, the language used appears to me to have the same meaning. Sect. 2, sub-s. 1, of the London (Rating) Scheme, 1901, says: "In levying the general rate after April 1, 1901, effect shall be given to any exemption from any existing rate," and the definition of "existing rate" is "any rate leviable before April 1, 1901." Now can one in the ordinary use of language say that land which at the time is not exempted is exempted from an existing rate, because it will be exempted from some future rate if at some future time certain events happen which under the existing legislation confer exemption when they happen and not before? Considering the matter from that point of view, and while quite appreciating that there is a value in the land which the scheme might have protected in regard to a possibility of an exemption in the future, I can only come to the conclusion that the words of s. 10 of the Act and the words of s. 2, sub-s. 1, of the London (Rating) Scheme, do point to actual exemptions before 1901 under the provisions of the Public Health Act, 1875, and not to potential exemptions if certain

events happen in the future which have not yet happened. That seems to me to be the view expressed by Channell J. in *London and India Docks Co.* v. *Borough of Woolwich* (1), and on the best consideration I can give to the matter I think that is the correct view.

I reserve my opinion as to what would be the position if land was exempted under one head in 1899 and continued to be exempted, but under another head, as, for instance, if land originally exempted as pasture land was turned into a market garden, so that the exemption was under a different head but was continuous.

I reserve my opinion also as to what would be the case if the state of facts were these—if the land was exempted in 1899, ceased, for a time, to be exempted, and then was exempted again by being again used for purposes in respect of which it had been exempted in 1899. Those interesting problems may offer consolation to the Bar in the future. I agree with the view of the other members of the Court and think that the question asked in this case should be answered by our saying that this particular land which was not in fact exempted in 1899 or before 1901, but which became covered by water after that period, should now pay on its full annual value and not on the quarter value on which it would pay if it had exemption.

LORD STERNDALE M.R. We answer the question stated in para. 14 of the case by saying that the appellants there, the respondents here, are liable to be assessed to the said general rate in respect of the said hereditament, in so far as it consists of land covered with water, upon the full net annual value thereof.

Appeal allowed.

Solicitors: *E. F. Turner & Sons; Sir A. B. Bryceson, Town Clerk, Woolwich.*

(1) [1902] 1 K. B. 750.

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Landlord and Tenant—Dwelling House—Rent—Apportionment—House last let as a whole before the War—House as a whole structurally altered with Loss of Identity—Floor not materially altered but indirectly improved—Lease of Floor—Right of Tenant of Floor to Apportionment of Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 3, 9.

A dwelling house which consisted of several floors was last let as a whole before August 3, 1914. In 1920 the owner of the house made substantial structural alterations in it which rendered it suitable for occupation in separate parts, and in consequence of these alterations the identity of the house as a whole was destroyed. The first floor remained structurally unaltered, except that it was provided with a new lavatory basin and pan, but that floor was indirectly greatly benefited by the alterations made in the house as a whole. The owner then let the floors to different tenants. On an application by the tenant of the first floor under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3, for an apportionment of the rent of the house at the date when it was last let as a whole, for the purpose of determining the standard rent of the first floor:—

Held, that in these circumstances the first floor had been so altered as to have lost its identity, and that the application for apportionment could not be entertained.

Appeal from Wandsworth County Court.

By an agreement which expired before August 3, 1914, the dwelling house, No. 23 Crescent Road, Clapham, S.W., was let in its entirety by the then owner, Mr. Edwards, to a tenant at a rent of 60*l.* a year, and the house was not afterwards let either before or on that date. The house consisted of five floors—namely, a basement, a ground floor, and three upper floors. There was communication between the floors by a staircase. On each floor there were two rooms, a front room and a back room which were both self-contained, having no internal communication between them, but opening upon a landing. In the basement there was a lavatory. On the ground floor there was a w.c. On the first floor there was a bathroom, and the front room on that floor had an alcove or ante-chamber, to which the only access was through that room and which was not separated from that room by any partition. The bathroom on the first floor was for the use of that floor and also of the upper

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floors. Attached to the house with access from the ground floor there was a garage which had two small rooms above it.

About April, 1920, Mr. James Easton, a builder, bought the house from Mr. Edwards with a view to converting it into four separate dwellings. He thereupon did the following work in the house: In the basement he put in a concrete floor and new floor boards, took out a large kitchen range and put in a modern tile stove; in the back kitchen he took out the existing range and put in a new range, removed the copper, and put in a modern sink. On the ground floor he put a bath in the w.c., put in a sink and a dresser, and took away several cupboards. On the first floor he put a new pan to the w.c. and a sink in the bathroom. As to the second floor, he built a bathroom and w.c. for that floor which was approached by the half-landing from the first floor, and it was thus no longer necessary that the occupants of that floor should use the bathroom on the first floor. On the top floor he turned the two garrets into bedrooms. He did not put up partitions shutting off the floors from each other. He painted and papered the first, second and third floors. He furnished the hall with linoleum and mats. As regards the two rooms over the garage, he renewed the roof, partly renewed the floor, and put in a new bressemer, the old one having rotted. He reconstructed all the drainage, extended the water supply, installed gas, and put in separate bells for each floor. The work was not finally completed till 1922, and he estimated its total cost at about 900*l.*

In May, 1920, while the work was still in progress, Mr. Easton let the first floor of the house to Mr. J. B. Stockham at a rent of 25*s.* per week. Subsequently he let the basement of the house and the garage to a Mr. Unwin, the ground floor of the house and the two rooms over the garage to a Mr. Marks, and the second and third floors of the house to a Mr. Saber. As there was no kitchen accommodation on the first floor, Mr. Stockham did his cooking by means of a portable gas stove. He curtained off the ante-chamber from the front room and used it as a lumber room. For

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a time he had not the exclusive use of the bathroom and lavatory on his floor, as these were used by the tenant of the upper floor until that floor was provided with a bathroom. He had the use of the garden, where he had a fowlhouse. Mr. Saber heated the water for his bathroom by gas. Mr. Marks used the rooms over the garage as sleeping rooms. Dust and refuse from all the floors was carried to the back garden by the passages and staircase. The coal for each floor was carried through the house and deposited in the back garden. There was a common washhouse in the area besides sanitary appliances.

On December 12, 1922, Stockham took out a summons under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3, in the county court requiring Easton to attend the Court on the hearing of an application by the former for an apportionment of the rent at which the house was last let before August 3, 1914, for the purpose of determining the standard rent under the Act of the part of the house in the occupation of Stockham.

The summons came first before the registrar. Evidence was given by the parties and others in proof of the facts above stated. Stockham further stated that when he became tenant the work in the house was not finished, that he was not then informed that separate lavatory and bathroom accommodation were to be provided for Saber, and that he did not understand that the floors of the house were to be occupied as separate floors. Easton further stated that he considered that in doing the above work he had made substantial structural alterations in the house. The rating clerk stated that at the time of the hearing the house was assessed at 60*l.* gross and 50*l.* net, and that there was no separate assessment of the different floors.

It was contended on behalf of Easton that by reason of the above-mentioned alterations the identity of the house had been destroyed and that therefore the rent could not be apportioned. It was contended on behalf of Stockham that the alterations had not affected the identity of the part of the house which had been let to him—namely, the first

floor, and that there could therefore be an apportionment of the rent in respect of that part of the house.

The registrar was of opinion that the rent at which the house as a whole was last let before August 3, 1914—namely, 60*l.*, should be apportioned for the purpose of determining the standard rents of the parts into which the house had been divided, that the rent should be so apportioned that the standard rent of Stockham's flat was 18*l.* 17*s.* 6*d.* per annum, or 7*s.* 3*d.* per week. On the application of Easton the matter was referred to the county court judge.

On January 21, 1923, the deputy county court judge gave judgment, in the course of which he stated that the case involved a very difficult point which appeared not to have been previously decided; that the question seemed to be whether the dwelling house occupied by Stockham—namely, the first floor of the whole house, was to be regarded as the same as it was before August 3, 1914; that the house as a whole had been altered to some extent with regard to the floors; that the first floor had not been structurally altered from its original condition; that the point had been raised whether he (his Honour) was to look only at Stockham's premises, or to look at the whole house and say whether it had been altered in such a manner as to make it lose its original identity; that the previous cases of *Marchbank* v. *Campbell* (1) and *Sinclair* v. *Powell* (2) seemed to show that he must have regard to Stockham's dwelling house and not to the whole house; that there had been no substantial alteration in Stockham's dwelling house, and therefore there must be an order for apportionment; that he thought there had been substantial structural alterations in the whole house; that if he had to look at the whole house, the alterations which he had mentioned would have been sufficient to remove the house from liability to apportionment; that as he found that there had been no substantial alterations in respect of Stockham's dwelling house, the view of the registrar was right and there must be an order for apportionment.

(1) [1923] 1 K. B. 245. (2) [1922] 1 K. B. 393.

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Easton (hereinafter called the appellant) gave notice of appeal for an order that the said judgment should be set aside, and for a declaration that the letting to Stockham (hereinafter called the respondent) was not the subject of apportionment within the meaning of the Act of 1920, s. 12, sub-s. 3, and that the rent of 1*l.* 5*s.* per week agreed to be paid by the respondent, in respect of the part of the dwelling house occupied by him, was the amount of the first and standard rent of the part of the said dwelling house occupied by the respondent and was payable by him; and that the grounds of the appeal were that the deputy-judge was wrong in law (i.) in holding that the part of the premises occupied by the respondent was subject to apportionment within the said sub-section; (ii.) in holding that the standard rent of the said part of the said premises occupied by the respondent was 18*l.* 17*s.* 6*d.* per annum, or 7*s.* 3*d.* per week; (iii.) in holding that there was not a new and separate dwelling house both in law and in fact created in respect of the said part of the said premises occupied by the respondent, notwithstanding the substantial structural alterations carried out in making the whole of the premises into four new and separate dwelling houses; (iv.) in not holding that by reason of the separation by substantial structural alterations of the remaining portions of the said premises, and the creation out of that remaining portion of three new and separate dwelling houses, from the said part occupied by the applicant, a new and separate dwelling house adapted in all respects with all conveniences was created of the said part occupied by the applicant; (v.) in holding that in its present form the part occupied by the respondent was last previously let as part of the whole premises before August 3, 1914; and (vi.) in not holding that the identity of the whole premises was so lost by structural alterations as to prevent the said part occupied by the respondent from remaining as part of the whole premises before August 3, 1914.

Merriman K.C. and *Ronald Walker* for the appellant.
Greaves Lord K.C. and *Bickmore* for the respondent.

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LUSH J. This case, in which we have had great assistance from the able arguments of counsel, raises a novel and important question under the Increase of Rent, &c. (Restrictions), Act, 1920. The respondent became tenant of the first floor of a house belonging to the appellant at the agreed rent of 25*s.* a week. He applied to the Wandsworth County Court for an apportionment of the rent. The registrar heard evidence, and expressed the opinion that the rent should be apportioned, but referred the matter to the judge. The learned judge upon that evidence came to the conclusion that the case was a proper one for apportionment, and he apportioned the rent of the first floor of the house at 7*s.* 3*d.* a week. The apportioned rent is thus less than a third of the rent that the respondent agreed to pay. The appellant has appealed, and the question which we have to decide is whether the case is one in which the tenant is entitled to have the rent apportioned.

The house, which is at Clapham, was last let as a whole before August 3, 1914, at a rent of 60*l.* a year. In 1920 the appellant bought it with a view to making very extensive alterations and improvements in it. He in effect reconstructed the house, making structural alterations in a large part of it upon which he spent no less than 900*l.* So extensive were these alterations that the learned judge in his judgment said: "If I had to look at the whole house, the alterations which I have mentioned would have been sufficient to remove the house from liability to apportionment." In other words, he held that the alterations were so substantial that the house as a whole could not be said to be the same house as had existed in 1914, or that the house as a whole, to use a common expression, had lost its identity. As, however, there had been no substantial structural alteration in respect of the respondent's dwelling house, which was the first floor, forming part only of the house, the learned judge went on to say that he held "that the learned registrar was right and that therefore the order for apportionment must stand."

The question is whether that view of the learned judge

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is right or wrong. The contentions of the parties are these: It is said for the respondent, the tenant, that if this floor has not been substantially altered there is no difficulty in apportioning the rent in respect of this floor, because one has only to take into account the fact that the whole house was let at 60*l.* a year and to find what proportion of that sum was, if I may use the expression, commanded by this floor. It is argued that unless the floor of the house which has become a separate dwelling house under the Act has itself been the subject of substantial structural alterations, the landlord cannot let it except at the apportioned rent. The contention on the other side is that although the floor in question, which consists of three rooms, has not itself been structurally or substantially altered inasmuch as each room so far as the four walls, the floor, and the ceiling are concerned is the same room as it was before, yet the character of the rooms may have altered by reason of the alteration of the house of which they formed part. It is argued that the learned judge was wrong in confining his attention to the question whether these particular rooms had been altered, and that he ought to have considered whether owing to the structural alterations of the house these rooms themselves had not for the purpose of the Act been so altered as to justify the landlord in taking a fair rent for them, although that rent might exceed the proportionate part of the rent of the whole house at which these rooms were originally let.

In proceeding to decide between these two contentions I desire to say that the Act of 1920 is so drawn as to throw practically no light upon what was intended when power was given to a county court judge to apportion rent. All that it says on the subject is comprised in s. 12, sub-s. 3, which provides that: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems

just. . . . ." The Act does not say when it is necessary to apportion the rent, but leaves it to the Courts to determine when to do so. There is incidentally a reference to the matter in s. 12, sub-s. 9, which says: "This Act shall not apply to a dwelling-house erected after or in course of erection on the second day of April, 1919, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements; . . . ." It has been held, I think in more cases than one, but certainly by McCardie J. and myself in the very recent case of *Darrall* v. *Whitaker* (1), that that sub-section was not required at all. It only furnishes an instance of cases in which there is no right to an apportionment. Even if the house had been bona fide reconstructed and converted into flats or tenements that were not self-contained, or possibly into something that would not be called flats at all, the right of apportionment would be lost. The sub-section is merely an example of a class of cases in which by reason of the loss of identity there is no right to apportionment.

We have, therefore, to apply the principles which have been laid down in previous decided cases in order to find whether this floor can properly be said to have been so substantially altered as to allow the landlord to charge any rent that is fair without regard to the rent which was originally paid for the whole house. Reference was made in the course of the argument to the cases of *Sinclair* v. *Powell* (2) and *Marchbank* v. *Campbell* (3), and it was contended that those cases have decided this question adversely to the landlord. I do not think they have. I do not think those cases really bear upon the question before us, which is an entirely new question. Neither of those cases dealt with facts like these in the present case. The only point considered in those cases was what sort of alteration or reconstruction is necessary in order to disentitle a tenant to have an apportionment. We have to consider this case

(1) [1923] W. N. 165. (2) [1922] 1 K. B. 393.
(3) [1923] 1 K. B. 245.

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upon principle, and we are in no way fettered by authority in coming to a decision in regard to it.

I think it may help us to come to a conclusion in this case to consider shortly the policy of the Act. Assuming that the case is fairly open to either of the two views which are presented to us, if we find that one of these views is in accordance with and furthers the policy of the Act, that will tend to show that it is the true view. If, on the other hand, we find that it is against the policy of the Act, that will of course be a reason why we ought not to adopt it. Undoubtedly the policy of the Act was to encourage a landlord and not to hamper him in adding to the number of dwelling houses. In this case the landlord has reconstructed the house as a whole, making it available for several tenants, and has effected great improvements in it, even indirectly upon the first floor, and if we were to hold that notwithstanding the benefits which this floor has derived from the improvements in the house he is still bound by the proportion of the old rent which this floor bore, it would tend very much to discourage a landlord from undertaking work of this kind. To hold that a landlord who has spent a large sum on reconstruction must be left to get his remuneration from the particular floor or floors that he has structurally altered and is not allowed to get it also from a floor which has derived benefit from the alterations, merely because the alterations in that floor itself are trifling, would, I think, deter landlords from effecting such improvements, and so far from furthering the policy of the Act would really hamper it.

The facts here have been found by the registrar, and it is unnecessary to consider them in detail. As I have said, the landlord expended 900*l.* He converted entirely the lower part of the house. He did not make such extensive alterations on the first floor, but he effected some improvements on that floor, both directly by giving the tenant of that floor a lavatory and closet for his exclusive use, and indirectly by providing on other floors two baths and two closets, it being necessary on one of these floors to build another bathroom and closet. He made an alteration to the drainage of

the premises which of course was a benefit to this floor as well as to the rest of the house, and he did other work in the house which led the learned judge to say that, if he was at liberty to look at the whole house, he would have held that it had lost its identity, and that there was no right to apportionment.

When the case of *Darrall* v. *Whitaker* (1) was before the Court only a week ago this point partly arose, and McCardie J. and I heard a certain amount of argument about it. It was not necessary for us to decide the point in that case, because we held there that the floor in question had itself been substantially altered and had lost its identity. I confess that my inclination in that case and at first in the present case also was in favour of the contention on behalf of the tenant; but having heard the able argument of Mr. Merriman, and having very carefully considered the point, I have come to the conclusion that my first view was wrong, and that Mr. Merriman's contention is right that the learned judge was entitled to look at the whole house and ought in the circumstances of this case to have refused the application for apportionment. Let us suppose in the first place that the landlord, having altered this house as he has altered it, had let the house as a whole, there is no doubt that in that case he would have been perfectly unfettered with regard to the rent which he could ask for the whole house. Supposing, next, that he had afterwards let the house in separate floors, it would surely seem a little strange if in that case he had to go back to the state of things that existed in 1914 and ask only the rent that this floor would then have commanded, having regard to the then condition of the house, and should not be entitled to ask the rent that the floor now commands, having regard to the present condition of the house. I think it is altogether wrong to say that, in order to ascertain whether the floor or the room in question has been substantially altered so as to give its tenant a right to apportionment of rent, it is permissible to shut one's eyes to the fact that by reason of the alterations in the rest of the house that

(1) [1923] W. N. 165.

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floor or room has itself also for the purpose of occupation been altered and improved. Supposing, for example, that instead of a narrow, awkward, and inconvenient staircase, by which access was originally gained to a floor, a new and convenient staircase was constructed, or that the original approach to the house, and therefore to the particular floor, has been improved, I think it would be quite impossible to say that the floor, as a lettable floor, still remained the same as it was in 1914. I think it would not only be unjust to the landlord to say so, but that on the true view of the Act itself we should be wrong in law in holding that, notwithstanding all the changes made in the house, it was necessary to apportion the rent. The proper view to take in a case of this kind is to have regard to the house as a whole, and if it be found that the structural alterations to the whole house have been such as to cause it as such to lose its identity, and directly or indirectly to affect the separate floors or rooms in it, then to treat these floors or rooms as having themselves been altered in a substantial manner, and as being no longer the same as they were in 1914.

I therefore think that in this case the county court judge ought to have refused to make the apportionment, and that this appeal should be allowed.

SALTER J. I agree. The house, No. 23 Crescent Road, Clapham, was last let as a whole before August, 1914, and was at that time suitable for occupation by one family only. Subsequently, the landlord made very genuine and substantial structural alterations, upon which he expended a considerable sum of money, and thus rendered the house suitable for decent occupation by four separate tenants. The work did not amount to reconstruction by way of conversion into separate and self-contained flats within the meaning of s. 12, sub-s. 9, of the Act of 1920. Having made these alterations, the landlord in 1920 let this house in separate parts to four separate tenants, the portion let to the respondent being the rooms which formed the first floor.

Some work, but not much, had been done to these rooms. It seems plain, however, that the letting value of a part of a house may be enormously increased by reason of substantial structural alterations made in other parts of the house, although the portion in question may not be much changed.

In the present case the learned judge had to decide whether the respondent's dwelling house, that is to say the rooms in question, was to be put into the second or the third of the three categories created by s. 12, sub-s. 1 (*a*), of the Act. He had to decide whether or not these rooms were first let after August 3, 1920, that is to say, when they were first let separately, after the structural alterations had been made. In order to do so he applied the test laid down in *Marchbank* v. *Campbell* (1) in these words: "To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling house in law, by virtue of a new and separate letting, but a new and separate dwelling-house in fact, by virtue of substantial structural alteration." The learned judge had to consider whether these rooms had become a new and separate dwelling house in fact by virtue of substantial structural alterations. He held that he was bound and entitled to look only at the work that had been done in these particular rooms, and was not entitled to look at the work that had been done in the rest of the house. In my view that is too narrow a reading of what was said in *Marchbank* v. *Campbell*. (1) He was entitled to look at all the material facts, and the structural work done in the other parts of the house was a material fact. He was entitled to ask himself whether the result of all the work that had been done in the house had not been to render the first floor of the house a new and separate dwelling house in fact. The learned judge has stated that if he had thought himself free to look at the structural work in the whole house, he would have held that the respondent's dwelling house, consisting of these first-floor rooms, became a new and separate dwelling

(1) [1923] 1 K. B. 245, 250.

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house by virtue of structural alterations. He was entitled to look at the structural work as a whole, and he should therefore have held that the respondents' dwelling house was first let when it was first let separately, and should have refused to make an apportionment of the rent.

The appeal ought therefore to be allowed, and the order made in the county court for apportionment and the apportionment thereunder set aside.

Appeal allowed.

Solicitor for appellant: *Herbert A. Phillips.*
Solicitors for respondent: *Lindo & Co.*

J. R.

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July 17, 23.

[IN THE COURT OF APPEAL.]

BADMAN BROTHERS *v.* THE KING.

Petition of Right—Amendment—Jurisdiction of Court to allow—Limits of Amendment—Petitions of Right Act, 1860 (23 & 24 *Vict. c.* 34), *s.* 7.

Under s. 7 of the Petitions of Right Act, 1860, the Court has jurisdiction to allow a petition of right to be amended, provided the amendment does not involve a substantial alteration in the cause of action, so that the allowance of it without a fresh fiat would operate in derogation of the prerogative of the Crown. The test whether a particular amendment ought to be allowed is this: If the petition had originally been presented in the form in which it stands after amendment, is there a reasonable probability that the fiat would not have been refused?

APPEAL from Horridge J. at chambers.

The suppliants, Badman Brothers, by their petition of right dated March 10, 1922, alleged that by a contract made in July, 1920, between the Acting Controller of the Timber Supply Department of the Board of Trade and the suppliants the Acting Controller agreed to sell and deliver to the suppliants 20,000 tons of pit props at 52*s.* 6*d.* per ton; that it was a term of the contract that the timber should be delivered not later than March 31, 1921; that the Acting Controller

delivered 3000 tons, but failed to deliver the balance. The particulars of damage were as follows :—

"At the date when the deliveries under the said contract ought to have been made there was no available market in which your suppliants could buy in timber of the contract description and they accordingly purchased timber of the nearest description to the contract quality available. Such purchases consisted of 17,000 tons of larch in whole woods at 75*s.* per ton, which woods included large quantities of spruce-fir and hard-wood which was of no value.

	£	*s.*	*d.*
"Difference between contract price of 52*s.* 6*d.* and 75*s.* per ton on 17,000 tons	19,125	0	0
"Difference between value of the said 17,000 tons of whole woods and value of 17,000 tons of props of contract description	15,000	0	0
	£34,125	0	0"

And that sum the suppliants claimed.

By his answer and plea the Attorney-General, on behalf of the Crown, admitted the contract, but alleged that 4353 tons had been delivered, and that the suppliants were not ready and willing to take delivery of the balance.

The suppliants, being desirous of amending their particulars of damage, took out a summons for leave to amend by alleging that the amount delivered under the contract was 4733 tons, not 3000, and by striking out the whole of the particulars stated in the petition and substituting therefor the following :—

"Particulars :—	£	*s.*	*d.*
"(*a*) Your suppliants bought in to fill the said contract 11,568 tons of larch at the price of	51,540	0	0
The contract price of 11,568 tons at 52*s.* 6*d.* a ton was	30,367	0	0
	£21,173	0	0

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	£	s.	d.
"(*b*) Your suppliants were unable to buy 3699 tons of the undelivered quantities. Your suppliants had contracted with their customers by numerous contracts to resell such undelivered quantities at prices which exceeded the said bought prices by a total sum of 4739*l.* 5*s.*, which sum your suppliants have lost	4,739	5	0
"(*c*) In order to obtain delivery of 10,653 tons of the quantity of 11,568 tons referred to in para. (*a*) hereof, and to minimise the damage which would accrue to your suppliants by the non-delivery thereof it became necessary for your suppliants to enter into a contract with Badman Williams, Limited, to supply and deliver the same to your suppliants. It was a term of the said contract that your suppliants would indemnify the said Badman Williams, Ld., against all expenses incurred in clearing the estates from which the said 10,653 tons were supplied and your suppliants have become liable to pay to the said Badman Williams, Ld., in respect of such indemnity the sum of	6,500	0	0
"(*d*) Overhead charges necessarily incurred by your suppliants in obtaining the said 11,568 tons	5,250	0	0
	£37,662	5	0"

The master at chambers made an order giving leave to amend. (1) Horridge J. on appeal reversed the master's

(1) The amended particulars as presented to the master contained the following further paragraph: "Of the quantities delivered under the said contract 2447 tons were not up to the contract description and/or were not merchantable, and your suppliants resold the same at the best prices obtainable and incurred a loss of 1672*l.* 2*s.* 4*d.*" But on the hearing of the appeal before Horridge J. that paragraph was

order and disallowed the amendment. He was of opinion that the Court had power to amend if the proposed amendment did not involve the setting up of a new cause of action, but consisted in a mere change of date or variation in the formulation of the contract. He noted that the suppliants were willing to waive the claim in respect of the quantity alleged not to be up to contract description; but here the amended particulars, though not amounting to a new cause of action, involved an entirely different mode of presenting the case, inasmuch as under the original particulars the claim was based on the footing that the suppliants had bought in 17,000 tons which were still of less value than the contract timber, whereas in the amended particulars they alleged a purchase of 11,568 tons only, but claimed for two items of consequential damage, first because they had been obliged to enter into another contract with Badman Williams, Ld., and secondly had incurred overhead charges, and the total claim was increased. The suppliants appealed to the Court of Appeal.

Stuart Bevan K.C., *Sir Albion Richardson* and *Vos* for the appellants. The Court has jurisdiction, under s. 7 of the Petitions of Right Act, 1860 (1), to amend a petition of right;

abandoned on the ground that it in substance alleged a different cause of action, and was treated as struck out.

(1) The Petitions of Right Act, 1860, recites in the preamble that "It is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject."

Sect. 1 provides that a petition of right may be intituled in any one of the superior Courts at Westminster.

Sect. 2: "The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done."

Sect. 7: "So far as may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal

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the power of amendment given by that section is not limited to amendments of the Crown's pleadings, but extends also to those of the suppliant: *Ruffy Arnell Co.* v. *The King.* (1) That jurisdiction however is limited to cases in which the amendment would not be "inconsistent with this Act," and it may be that an amendment which had the effect of substituting a new cause of action without obtaining a new fiat would be inconsistent with the Act. But here the appellants do not seek to set up in the amended petition a different contract or a different breach, but only an increase in the amount of the damages resulting from the breach. It is not necessary for the suppliant to specify his damages in the petition. It is sufficient to claim a declaration that he is entitled to damages, leaving the amount to be ascertained on an inquiry, as was done in *Marconi's Wireless Telegraph Co.* v. *The King.* (2) The Court is not asked to go nearly as far as McCardie J. went in *Ruffy Arnell Co.* v. *The King.* (1) There the petition sought to recover damages for breach of a contract by the War Office under which the suppliants were to train pupils at their flying school for reward, and McCardie J. allowed an amendment of the petition which involved a radical alteration in the contract, first in the date at which the contract was alleged to have been made, and secondly in the amount of the training fee payable. As in the present case the cause of action remains the same, the Court ought not in the exercise of its discretion to "otherwise order."

Sir Douglas Hogg A.-G. and *Bowstead* for the Crown. The Court has no jurisdiction to allow a petition of right to be amended without the consent of the Crown, s. 7 of the

actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

(1) [1922] 1 K. B. 599.

(2) [1918] 1 K. B. 193.

Petitions of Right Act notwithstanding. The power of amendment given by that section is confined to amendments of the Crown's pleading. The word "amendment" in the section follows immediately after "security for costs," which cannot apply to the suppliant, for the suppliant could never get security for costs against the Crown. Nor does the law in force as to "the means of procuring evidence" extend to the obtaining of discovery of documents by the suppliant: *Thomas* v. *The Queen.* (1) That shows that the section does not apply to the suppliant. The law on this subject is correctly stated in Robertson's Civil Proceedings by and against the Crown, at p. 390: "Can a petition of right be amended? The Crown has granted its fiat to a particular petition, and it is obviously not within the subject's competence to amend it into something else without the Sovereign's leave, in spite of s. 7 of the Act. Strictly, therefore, a fresh petition should be presented and a fresh fiat obtained." Under the old practice there was an absolute right in the Crown to grant or refuse a fiat; the subject had no remedy except such as the Crown chose to give him. Until the decision in *Ruffy Arnell Co.* v. *The King* (2) it was generally understood that the old practice in that respect had not been altered by the Act of 1860. It is true that in *Thomas* v. *The Queen* (3) Blackburn J. seems to have assumed that there was power to amend the petition, but the amendment there suggested may have been by consent. In *Royal Mail Steam Packet Co.* v. *The King* (4) a suggestion was made that the petition might be amended, but the Attorney-General (Sir Gordon Hewart) objected that a petition of right could not be amended, and that objection seemed to be accepted by Bailhache J. It was held in *Tobin* v. *The Queen* (5) that s. 7 did not take away the right of the Crown to do anything in connection with a petition of right which it was previously entitled to do in the exercise of the prerogative. The question there was whether since the

(1) (1874) L. R. 10 Q. B. 44.
(2) [1922] 1 K. B. 599.
(3) (1874) L. R. 10 Q. B. 31, 33.
(4) (1921) 37 Times L. R. 554.
(5) (1863) 14 C. B. (N. S.) 505.

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statute the Crown could both plead and demur to a petition of right, and it was held that it could, there being in the statute nothing to take away the prerogative right of the Crown to plead double. That the Act does not take away the right of the Crown to require a new fiat as a condition of an amendment is shown by the proviso to s. 7, which says that "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act." To allow an amendment without consent would be giving the subject a new remedy. That the amendment asked for is in respect of some trifling matter makes no difference. However small the amendment proposed it is the Crown and not the Court that should be asked to make it. Secondly, if the Court has jurisdiction to amend, it ought not, in the exercise of its discretion, to make the amendment here asked for, for the appellants not only seek to increase the amount of their damages, but propose to make a substantial change in the manner of arriving at those damages, involving a wholly different way of presenting the case.

Bevan K.C. was not called on to reply.

BANKES L.J. This is an appeal which raises two questions, one an extremely important question as to the jurisdiction of the Court to allow an amendment of a petition of right, the other a question of minor importance as to whether in the exercise of the Court's discretion the particular amendment asked for should be allowed. The facts which give rise to the appeal are these: Messrs. Badman, the appellants, presented a petition in which they alleged that they had entered into a contract with the Acting Controller of the Timber Supply Department of the Board of Trade for the purchase of a large quantity of pit props, and they complained that the Acting Controller had been guilty of a breach of contract in failing to supply the contract quantity. They claimed a large sum as damages, and in their petition gave particulars showing how those damages were arrived at. They

said that, in order to supply themselves with the pit props that the Acting Controller had failed to supply, they had to buy 17,000 tons of standing timber, and they calculated their loss first by reference to the difference between the contract price and the price which they had to pay, and secondly to the difference in value of the 17,000 tons of standing timber and that quantity of pit props of the contract description. The petition was presented and the fiat entitling them to proceed was given. The Attorney-General filed his answer, in which he did not dispute the making of the contract, or that a large portion of the contract quantity had not been delivered, but he alleged that the suppliants were not ready and willing to take delivery. In that state of the pleadings the suppliants sought to amend their petition by substituting for their original particulars of damage a fresh set of particulars in which they computed their damages in a different way. The question is whether since the Act of 1860 the Court has jurisdiction to allow that amendment. That Act, after reciting in the preamble that "It is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject," and dealing in s. 1 with the presentation of the petition, goes on in s. 2, which is, in my opinion, all important, to provide that "The said petition shall be left with the Secretary of State for the Home Department in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done." It was pointed out in *Tobin* v. *The Queen* (1) that the obvious intention of that section was to preserve the prerogative of the Crown in relation to the granting of the fiat, and to make it clear that the subject was to have no greater right of presenting a petition without first obtaining a fiat after the passing of that Act than he had before.

(1) (1863) 32 L. J. (C. P.) 216, 221.

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Erle C.J. in delivering judgment said: "It is said that s. 7 of the 23 & 24 Vict. c. 34 applies, and that the Legislature has taken away the Queen's prerogative and given a right of action, and subjected the Crown to all the rules of pleading. I think that the words of the statute by no means justify that statement. The words of s. 2, so far from giving the subject a right of action against the Queen absolutely, which every subject has who claims to have an action against a fellow-subject by suing out a writ, are:"—he read the section—"The prerogative is recognised and remains." That view of the effect of the statute was also taken in another case to which we were referred: *Thomas* v. *The Queen*. (1) There the suppliant moved for a rule calling on the Secretary of State for the War Department to make an affidavit of documents relating to the matter in dispute, to which the Solicitor-General's answer was that it was a fatal objection to the rule that s. 7 of the Petitions of Right Act does not apply the proceedings under s. 50 of the Common Law Procedure Act, 1854, to a petition of right. The Court discharged the rule. In the course of the argument Cockburn C.J. said: "If it had been intended to extend s. 50 of the Common Law Procedure Act, 1854, as to discovery of documents, to the case of petitions of right, there would have been inserted some enactment saying an officer should answer, as in the case of bodies corporate." Those two cases are, I think, clear authorities that in the opinion of the judges who decided them it was not the object of the statute in any way to derogate from the prerogative of the Crown in reference to the grant or refusal of a fiat.

It is necessary to consider the provisions of s. 7, which deals with the practice and procedure. [His Lordship read the section.] It is quite plain that that section only applies the rules of practice and procedure in actions to petitions of right subject to the condition that their application must not be inconsistent with the provisions of the Act, and that they can only be applied in so far as is allowed by the discretion of the Court. I think that any amendment of a petition in such a way

(1) L. R. 10 Q. B. 44.

as substantially to deprive the Crown of the right to refuse the fiat, such as an amendment which introduced an entirely fresh cause of action in respect of which the Crown had never had an opportunity of considering whether it would grant a fiat or not, would be inconsistent with the provisions of the Act and therefore not permissible. That is the view which was taken of the statute by McCardie J. in *Ruffy Arnell Co.* v. *The King.* (1) Although I think that the way in which he applied the principle there laid down may be open to criticism, no exception can be taken to the statement of the principle itself. He said: "I think that any amendment which the Court may allow should not, and, indeed, cannot, be one which defeats the provisions of ss. 1 and 2 of the Act of 1860." So far that agrees with what I read from the judgment of Erle C.J.: "By this limitation the privileges of the Crown are amply guarded. If the suppliant seeks to substitute or add a substantially new cause of action no amendment should be allowed in the absence of a fiat by the King, or a consent by the Attorney-General." I would alter the language slightly by saying: "No amendment can be allowed." "But if the proposed amendment is, e.g., a mere change of date, or of amount, or a mere variation in the formulation of a contract, then I think that ordinarily the amendment should be granted. If the substance of the case is the same the Court can help the suppliant by amendment. If the substance of the case is changed the Court must refuse its aid for that purpose unless the consent of the Attorney-General be given." Personally I entirely agree with that view of the meaning of the statute.

The question then arises whether the proposed amendment in the present case introduces a new cause of action. The answer is that it does not. Therefore it is not open to objection on that ground. Then does it put forward a substantially different case from that for which the fiat was obtained? The answer to that question must be in every case a matter of degree. Here the case originally put forward in the petition was that the suppliants had contracted for the

(1) [1922] 1 K. B. 599, 608.

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purchase of a quantity of timber from the Timber Controller, and that by reason of the seller having failed to deliver the contract quantity they had suffered damage, and they asked to be paid the proper amount of damages in respect of that breach. That was the case in respect of which the fiat was granted. What they now say is that they made a mistake in the mode of computing their damages, and they ask to substitute the proper amount of damages for that originally claimed. I do not think that that is such an alteration as derogates from the prerogative of the Crown. It is, I think, the kind of amendment which the Legislature had in view when they said that it should be within the discretion of the Court to allow an amendment which was not inconsistent with the provisions of the statute. For these reasons I think the appeal should be allowed.

ATKIN L.J. The important question that arises in this case is whether there is power in the Court to allow the suppliant on a petition of right to amend his petition at all? and if there is, under what conditions ought he to be allowed to do so? The answer to those questions depends upon the Petitions of Right Act, 1860. The object of that Act was to assimilate the proceedings in petitions of right as far as possible to the course of practice and procedure then in force in actions between subject and subject, and in pursuance of that object s. 7 provided that "so far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to" amongst other matters "amendment, ... in suits in equity, and personal actions between subject and subject . . . . shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right." Then there is a proviso that the statute is not to be construed as giving the subject any remedy against the Crown to which he would not have been entitled before the passing of the Act. Now amongst the statutes then in force dealing with the subject of amendment was the Common Law Procedure Act, 1852, which by s. 222 provided that "It

shall be lawful for the superior Courts of common law, and every judge thereof, ... at all times to amend all defects and errors in any proceeding in civil causes, ... and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made," and I can see no reason for supposing that the Legislature when it put in the Act of 1860 the provision as to incorporating the laws and statutes in force as to amendment did not intend that for the future in petitions of right all such amendments should be made as were necessary for determining the real question in controversy between the parties. But that power of amendment was to be subject to the safeguards which are inserted in the Act. First of all, it was only to apply "except in so far as may be inconsistent with this Act"; secondly it did not apply when "the Court in which the petition is prosecuted shall otherwise order"; and thirdly there is the proviso to which I have referred. In considering what amendments would be not inconsistent with the Act I am inclined to go further than McCardie J. went or than I understand my Lord is prepared to go. Personally I see no reason why under certain circumstances an amendment should not be allowed, even though it amounted to setting up a different cause of action from that originally sued on. As a matter of fact any variation in the averment of the contract sued on is an alteration of the cause of action. Indeed in *Ruffy Arnell Co.* v. *The King* (1) itself McCardie J. allowed an amendment whereby the suppliant claimed upon a contract contained in letters of considerably later date than that of the agreement upon which he originally claimed. So in an action on a sale of goods I see no reason why, if the suppliant, inadvertently or otherwise, has claimed for a breach of the implied warranty that the goods should be of the contract description he should not be allowed to amend by substituting an averment that the goods were not equal to sample. In the present case I myself should have seen no reason, where a man is suing upon a particular contract for the sale of

(1) [1922] 1 K. B. 599.

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goods and is adhering to that contract, why he should not say: "It is true that I claimed that 17,000 tons were not delivered, but now I want to say that 15,000 tons were not delivered, and 2000 were delivered but in such a state that they were practically worthless." The question in each case is whether the cause of action as amended is something substantially different from the cause of action as originally framed. The test would, I think, be: Is the Court satisfied by the representatives of the Crown that there is a reasonable probability that if the petition as amended had been presented in the first instance the fiat would not have been granted? That seems to me to be roughly the standard by which the Court should consider whether or not it should grant a particular amendment. I do not think that anything I have said conflicts with the decision in *Tobin* v. *The Queen*. (1)

With regard to the large proposition contended for by the Attorney-General, that the power of amendment conferred on the Court by the Act of 1860 is limited to amendments of the Crown's answer and does not extend to the suppliant's petition, I can only say that there does not appear to be any authority to support it. The authorities cited in Robertson on Civil Proceedings by and against the Crown are no authorities at all for that proposition. On the other hand there is a passage in the judgment of Blackburn J. in *Thomas* v. *The Queen* (2) which assumes the contrary. Dealing with the right of a subject to present a petition of right for the breach of a contract by the Crown resulting in unliquidated damages he there said: "Several objections are made in the points delivered as to the form of the counts, and the absence of sufficient allegations that those who made the promises had authority to contract on the behalf of Her Majesty; some of which, especially as applied to the second count, might probably have forced the suppliant to amend, but the Attorney-General, on the argument, declined to press any objection which could be cured by an amendment." It is clear that Blackburn J. was of

(1) 14 C. B. (N. S.) 505. (2) L. R. 10 Q. B. 31, 33.

opinion that amendment of a petition was permissible. Therefore I think here that there was power to amend, and that, if there was such power, the proposed amendment comes within the limits that I have mentioned. I think there is no substantial change in the cause of action, and that there is no reason to suppose that if the original petition had been presented in the form in which it is proposed to be amended the fiat would have been refused. I agree therefore that the appeal must be allowed.

YOUNGER L.J. I am of the same opinion. When this appeal came before the Court last week the Attorney-General expressed himself as prepared to contend that the word "amendment" in s. 7 extended only to amendments which might be made in the answer to a petition of right, and not, unless the Crown assented to their being made, to amendments which the suppliant might seek to make in his petition. As I understood the Attorney-General to-day he was not prepared to carry his contention to that length, and agreed that on the true construction of the Act the word "amendment" extended to the petition as well as to the answer. Indeed on the construction of the statute of 1860 it was not open to him to contend that a petition was not to be regarded as in the nature of a pleading to which the power of amendment would extend. That it was so regarded is borne out by the rules which in 1862 were made by the Court of Chancery under s. 15 of the statute, which rules are still in force though the section is repealed. That section authorized the Courts of law and equity to make rules "for regulating the pleading and practice on such petitions of right," and provided that such rules should be laid before both Houses of Parliament, and that after the expiry of three months from their being so laid before Parliament they should "be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament." Among the rules so made by the Court of Chancery in 1862, r. 7 (Feb. 1, 1862) provided that "So far as the same may be applicable, and except in so far as may be inconsistent with the said Act and the

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Younger L.J.

preceding orders, the general orders from time to time in force as to proceedings in suits in this Court, and the practice and course of proceeding in this Court in reference to such suits, shall be applicable, and apply and extend to proceedings in this Court in petitions under the said Act, which are, for the purposes of this order, to be considered as bills." We therefore have this order made in Chancery, having the force of a statute, in which it was expressly stated that petitions of right presented to the Court of Chancery were to be treated as bills, to which of course the power of amendment would extend as it extended to bills in Chancery at that date. That seems to me to be a further affirmation of the view, if affirmation were needed, that the power to allow amendment given by s. 7 extends as much to the petition as to the Crown's answer to it. That being so the Court has then to consider whether, when an application is made for leave to amend a petition, the amendment if allowed would make the petition inconsistent with the Act. In my opinion there is nothing in the amendment asked for which in any true sense prejudices the Crown. I agree with Atkin L.J. in thinking that the real question to ask is this: If this petition as proposed to be amended had been presented in the first instance would the fiat have been refused? It is not suggested by the Attorney-General that it would. Under those circumstances I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the appellants: *H. C. Mossop.*
Solicitor for the Crown: *Solicitor to the Board of Trade.*

J. F. C.

[IN THE COURT OF APPEAL.]

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1923
July 27.

TENERIA MODERNA FRANCO ESPAÑOLA *v.* NEW ZEALAND INSURANCE COMPANY.

[1922. T. 1594.]

Insurance (Marine)—Practice—Discovery—Order for Production of Ship's Papers—Form of.

The affidavit of ship's papers which underwriters are entitled to require from the plaintiff in an action on a policy of marine insurance is not limited to documents in the possession of the plaintiff or other persons interested in the insurance, but extends to all material documents in whosesoever possession they may be.

APPEAL from an order of Roche J. at chambers.

The action was by cargo owners against underwriters, the plaintiffs' claim being for a total loss upon three policies of marine insurance on hides per the steamship *Lila* from Barcelona to Genoa. The policies contained a warehouse to warehouse clause and covered the goods (inter alia) against theft, pilferage and non-delivery, barratry of the master and mariners and all perils of a similar nature.

The goods in question were delivered at the dock at Barcelona to the ship's agent for shipment on board the *Lila*, and the plaintiffs complained that they had been lost by one or more of the above-mentioned perils. Bailhache J. made an order for the production of ship's papers in the Law Stationers' form, whereby it is ordered that the plaintiff "and all persons interested in these proceedings and in the insurance the subject matter of this action" do produce and show to the defendants all documents relating to the insurance of the ship or cargo, and all documents relating to the alleged loss of the cargo; also various specially mentioned classes of papers, including log books and manifests, relating to matters in question in the action "which now are in the custody possession or power of the plaintiff and the said other persons as aforesaid," and that "the plaintiff and the said other persons as aforesaid do account for all such documents as

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were once but are not now in his their or any or either of their possession custody or power." The plaintiffs in their affidavit of ship's papers omitted to disclose the ship's manifest or the stowage plan. The master of the *Lila* made an affidavit in which he deposed as follows: That, the ship having arrived at Barcelona and being ready to load, one Klat, the principal owner of the ship, directed him to take his instructions relating to the steamer and her cargo from a man named Cohen; that Cohen tendered to him for signature bills of lading for hides and other goods which had not been shipped, representing that the bills were not for goods shipped but for goods received for shipment, which would in due course be shipped, and that he in good faith and under pressure from Cohen signed them; that the goods to which the above bills of lading related were never put on board; that Cohen then proposed to him that after leaving Barcelona he should sink the ship and promised him a bribe of 3000*l.* or 4000*l.*; that he refused to entertain the proposal, whereupon Cohen began to threaten him so that he dared not leave the ship, but that he drew up a report of what had taken place and sent it to the British Consul at Barcelona. Under these circumstances the defendants applied to Roche J. for a further affidavit of ship's papers, and his Lordship made the order. From that order the plaintiffs now appealed.

J. Dickinson for the appellants. The form of order for the production of ship's papers made by Bailhache J. in this case, though not identical with the Form No. 19 given in Appendix K to the Rules of the Supreme Court, is one which has been in common use for many years, and it limits the documents which the plaintiff must produce, or for the non-production of which he must account, to those which are in the possession or control of persons interested in the insurance the subject matter of the action. In the recent case of *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (1) the Court used language which showed that the order for production is rightly so limited. Scrutton L.J. (2) said

(1) [1922] 1 K. B. 563. (2) [1922] 1 K. B. 580–1.

"He" the assured "must make the fullest disclosure of documents that he has in his possession, and if the documents are in the possession of other persons interested he must do his utmost to get them and explain on affidavit, if he has not been able to get them, what he has done to get them and why he has not been able to get them; and he must account on oath for the disappearance of documents which have been but are no longer in the possession of himself or persons interested." There is no suggestion there that there is any obligation to produce or account for documents in the possession of persons not interested in the insurance. Then if that view is right there can be no obligation upon the plaintiff here to produce the manifest or stowage plan, for those are documents which are in the possession of the shipowner, and the shipowner is not a person interested in the cargo or in the insurance on it. No doubt in the earlier clause of the order dealing with "documents relating to the alleged loss of the cargo" there is no limitation that the documents must be in the possession of persons interested in the insurance, but those general words must not be read as including log books and manifests, for it would be absurd that the same documents should be dealt with twice in the order, once in a clause containing the limitation and again in another clause which did not contain it. If the defendants' contention is right the plaintiffs must produce all documents relating to the goods on board belonging to all the other cargo owners.

David Davies for the defendants was not called upon.

BANKES L.J. This is an appeal from an order of Roche J. directing in general terms that the plaintiffs should make a further and better affidavit of ship's papers. The action is brought by cargo owners against underwriters, and having regard to the extraordinary story told by the captain in his affidavit one can well understand that the underwriters desire the fullest possible information to which they are entitled. It is well known that defendants in an action on a policy of marine insurance are entitled to a much wider discovery than

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are other litigants in an ordinary commercial case, and I am not satisfied that what we said in *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (1) with reference to the extent of that discovery was quite correctly expressed. In what I may call the official form of order for production of ship's papers, Form No. 19 in Appendix K to the Rules of Court, there are two spaces left blank, one in the first line which runs " It is ordered that the do produce and show," etc., and the other in the later clause of the order dealing with certain specific classes of documents which runs " which are now in the custody, possession, or power of the his brokers solicitors or agents." In the form of order adopted by Bailhache J. in the present case the first of those two blanks has been filled up by inserting the words "plaintiffs and all persons interested in these proceedings and in the insurance the subject of this action," and the second blank has been filled up by inserting the words " plaintiffs and the said other persons as aforesaid." I do not think that it is correct to fill up the second of those two blanks in that way. As to what I said in the *Graham Joint Stock Shipping Co.'s Case* (1), I should have made it clear that I was referring only to the contents of the first blank space in the form of order. In the present case, Bailhache J. having made the order for production of ship's papers in the Law Stationers' form, the plaintiffs omitted to produce certain documents of which the defendants required discovery, amongst others the manifest and the stowage plan. One of the mysteries in this case is what has become of the plaintiffs' goods, and at what stage in their passage from the warehouse did they disappear. It is most material to ascertain whether or not they ever reached the vessel, and as production of the two documents specified may assist in clearing that point up, I think it is plain that the plaintiffs must either produce them or account upon oath for their inability to do so. Bailhache J.'s order, as drawn up, in so far as it required production only of documents which were in the possession of persons interested was

(1) [1922] 1 K. B. 563.

in my opinion too limited. Mr. Dickinson contended that a distinction was to be drawn between the general words at the beginning of the order and the later clause dealing particularly with certain special documents, and that the fact that a particular document was specially mentioned in the later clause excluded it from the operation of the earlier general words, with the consequence that its production would only be ordered if it was in the possession of the plaintiff or of some person interested. I have never before heard any one attempt to draw a distinction between the two parts of the order. I have no doubt that the ship's papers order has grown up gradually and that additions have been made to it from time to time to meet particular cases, with the result that you get sweeping general words followed by a clause dealing only with particular documents. But it has always been held that the order in its widest and most comprehensive form is justified by the practice which has prevailed over a very long period. I think the order of Roche J. should be upheld, and the appeal dismissed.

SCRUTTON L.J. I agree that this appeal fails, and I only add anything to what my Lord has said because certain expressions of mine in *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (1) were relied on as supporting the appeal. The facts of the case are very remarkable. The goods were to be shipped in Spain for carriage to Italy, and an affidavit by the captain was produced to the effect that a person connected with the owner procured him to sign bills of lading purporting to show that goods were shipped which were never in fact shipped, and then asked him to sink the ship, offering him a large bribe if he would do so and threatening that something very serious would happen to him in the event of his refusal, in consequence of which he remained on board and got a secret message conveyed to the British Consul. The plaintiffs' goods for which bills of lading were signed have entirely disappeared, and the Spanish owners now seek to recover from the underwriters.

(1) [1922] 1 K. B. 563.

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Upon such a statement of facts one can fairly say that if ever there was a case in which underwriters were entitled to the fullest discovery before they are called upon to settle what defence they shall make this is that case. An affidavit of ship's papers was made and the underwriters complained that it did not contain certain documents, amongst others the manifest and the stowage plan, and if it is a question whether the goods were ever put on board it is obvious that those documents are most material. But Mr. Dickinson says that the plaintiffs are under no obligation to make an affidavit about those documents because they are neither in the plaintiffs' possession nor in that of any person interested in the policy, and those he says are the only people to whom the affidavit of ship's papers applies. I confess that that contention startled me, for it is entirely opposed to what I always understood to be the rule during a long practice at the Bar in which I acted for most of the leading underwriters. I always understood it to be settled practice under an affidavit of ship's papers that a plaintiff cargo owner must either produce or account for the ship's papers notwithstanding that the shipowner is not in any way interested in the policy on which he is suing. In *China Traders Insurance Co.* v. *Royal Exchange Assurance Corporation* (1) A. L. Smith L.J., who when at the Bar had one of the leading marine insurance practices of that day, said "It is conceded that the old rule applies to insurance on goods just as it does to insurance on ship. If the plaintiff in the action has not got and cannot get the papers, and does not know where they are, he must say so," and Chitty L.J. agreed. It is to be observed that the counsel for the plaintiffs who then conceded that proposition was Mr. J. A. Hamilton, and he probably conceded it because he had as his opponent Mr. Joseph Walton Q.C., at that time the leading counsel in insurance matters. Mr. Dickinson endeavours to support his contention by reliance on certain language which I used in the *Graham Joint Stock Case* (2), but that language ought not to be detached from its context and read without reference to the subject matter of the

(1) [1898] 2 Q. B. 187. 191. (2) [1922] 1 K. B. 563.

case. There the plaintiffs were mortgagees of the ship, and they made an affidavit of ship's papers which did not disclose a number of documents in the possession of the owner. But the advance by the mortgagees was less than the amount insured by the policy, and therefore to the extent of the balance the shipowner was a person interested in the insurance. It was under those circumstances that I there more than once said that the plaintiff must produce, or explain why he cannot produce, material documents which are "in the possession of other persons interested." Nothing was further from my intention than to lay down the proposition that an owner of subject matter insured may excuse himself from trying to get material documents which are in the possession of another person because that person is not interested in the policy. That would be contrary to the whole experience of my professional life in insurance matters, and I hope that the passage cited from my judgment will not be used again for the purpose of suggesting that that was my view. If the plaintiff satisfies the Court on affidavit, and not merely by letters, that he has made all reasonable endeavours to get the papers from a person over whom he has no control and has been unable to get them, the Court will usually dispense with their production; but nothing short of that will suffice.

ATKIN L.J. I agree. I am satisfied that Roche J. in making the order appealed from acted in accordance with the long established practice dealing with claims by cargo owners on policies of marine insurance. It appears to me that the original order made by Bailhache J. is drawn in too limited a form. It is certainly not in the form, No. 19, in Appendix K. to the Rules of Court. At the same time Form 19, as has been pointed out on more than one occasion, is itself too limited, as it does not provide for the case of documents which were once in the plaintiff's possession but have ceased to be so. The order made in this case no doubt follows the form of order given in a work of great authority, Arnould on Marine Insurance. In the edition that I have before me, that of 1909,

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Atkin L.J.

the clause of the order specially dealing with certain particular documents—" all protests surveys " etc.—is, as here, limited to those " which are now in the custody, possession, or power of the said plaintiff and the said other persons as aforesaid," which I think means all persons interested in the insurance, " his, or their, or any or either of their brokers solicitors or agents." The reference given for that form is oddly enough said to be Form 19 of Appendix K. As I have already said I think that restriction as to documents which are in the possession of the plaintiffs " and the said other persons as aforesaid " is wrong. The real principle is that expressed in Arnould, at the beginning of par. 1271, where he says " There is one important point of practice, which is peculiar to actions on policies of marine insurance ; this is the practice whereby the underwriter is entitled, as a matter of course, to an order against the assured, requiring the latter to discover on oath, and to produce, all the ship's papers." Then the author goes on to say that that also applies to the assured on cargo. I think that is right. I think the assured on cargo is obliged to produce all the ship's papers even though they are where they normally would be, in the possession of the shipowner and not of persons interested in the cargo. Of course he can discharge that obligation by showing that he has made all reasonable efforts to get the papers and cannot get them. In my opinion the practical result of what has been said by the other members of the Court is that the order for production of ship's papers wants redrafting. I may add that I think the particular documents which are called for here would be covered by the general words in the first part of the order, but inasmuch as specific documents are mentioned it would be better to make it clear that discovery of those specific documents is not confined to such as are in the possession of the plaintiff and persons interested in the proceedings. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants : *Thomas Cooper & Co.*
Solicitors for the respondents : *Parker, Garrett & Co.*

J. F. C.

NIXON *v.* ERITH URBAN DISTRICT COUNCIL.

1923
Oct. 15.

[1922. N. 369.]

Corporation—Contract not under Seal—Executed Consideration—Work done at Request of Corporation—Statutory Duty—Housing Schemes—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *Part III., s.* 56—*Housing, Town Planning, &c., Act*, 1919 (9 & 10 *Geo.* 5, *c.* 35), *Part I., s.* 1.

Housing schemes prepared by an urban district council in accordance with Part III. of the Housing of the Working Classes Act, 1890, as amended by Part I. of the Housing, Town Planning, &c., Act, 1919, depend upon powers contained in the Public Health Acts, and contracts made in connection with those schemes, where the value or amount exceeds 50*l.*, must be under seal of the council as provided by the Public Health Act, 1875, s. 174.

Lawford v. *Billericay Rural Council* [1903] 1 K. B. 772 discussed and distinguished.

ACTION tried by Bailhache J. without a jury.

Plaintiff's claim was for 1150*l.*, money due for work done by him for the defendants as quantity surveyor at their request.

The defendants, who were the housing authority for the district under the Housing Acts, 1890 to 1919, had prepared a scheme under s. 1 of the Housing and Town Planning, &c., Act, 1919, Part I., which amends Part III. of the Housing of the Working Classes Act, 1890, for the erection (inter alia) of seventy-nine pairs of houses of a type suitable for the working classes. The question of the preparation of quantities, and specifications relating to these houses was considered at a meeting of the defendants' Housing and Town Planning Committee held on March 8, 1921, and a resolution was passed that it be left to their architect "to appoint whatever additional temporary assistance he deems necessary, or alternatively to instruct a firm of quantity surveyors to prepare the same." This resolution was adopted and confirmed by the defendants at a council meeting held on March 30, 1921. The architect then instructed the plaintiff to supply the necessary specifications and bills of quantities, and agreed with him (as Bailhache J. found in fact in his judgment in the case) that

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his remuneration should be at the rate provided by General Housing Memorandum No. 31 of the Ministry of Health dated July 8, 1920. The plaintiff did the work, and the defendants advertised for tenders for building based upon his quantities and specifications, the lowest tender being accepted. Afterwards, owing to the action of the Ministry of Health, the defendants abandoned this part of their scheme, and when the plaintiff sent in his account they informed him that his charges were excessive, and that upon this and other grounds they were not prepared to pay.

The plaintiff thereupon issued the writ in this action, the only defence here material being that as there was no agreement under the common seal of the defendants the plaintiff could not recover. The defendants paid 50*l.* into Court with a denial of liability.

J. G. Hurst K.C. and *Mulligan* for the plaintiff. This case is an exception to the rule that a corporation can only contract under seal. The defendants' housing scheme was not made under the provisions of the Public Health Act, 1875, but under Part. III. of the Housing of the Working Classes Act, 1890, and the Housing and Town Planning, &c., Act, 1919. (1) The preparation of such schemes by local authorities, which was optional under the Act of 1890, s. 56 (1), was made compulsory by the Act of 1919 s. 1, and the Public Health Act, 1875, s. 174, does not apply. (2) The work which the plaintiffs did was work which

(1) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III., s. 56: "Where this part of this Act has been adopted in any district, the local authority shall have power to carry it into execution . . . . and for that purpose may exercise the same powers whether of contract or otherwise as in the execution of their duties . . . . in the case of Sanitary authorities under the Public Health Acts. . . . ."

Sect. 57, sub-s. 1: "Land for the purposes of this part of this Act may be acquired by a Local Authority in like manner as if those purposes were purposes of the Public Health Act, 1875, and sections 175 to 178 both inclusive, of that Act (relating to the purchase of lands) shall apply accordingly. . . . ."

(2) Housing, Town Planning, &c., Act, 1919 (9 & 10 Geo. 5, c. 35), s. 1, sub-s. 1: "It shall be the duty of every local authority within the meaning of Part III. of the Housing of the Working Classes Act, 1890

the defendants were bound to carry out, and as the plaintiff's bills of quantities were accepted and acted upon by the defendants, the absence of a contract under seal is no answer to the plaintiff's claim: *Lawford* v. *Billericay Rural Council* (1), which was applied in *Douglass* v. *Rhyl Urban Council.* (2)

Montgomery K.C. and *William Allen* for the defendants. The ordinary rule applies, and a contract under seal is necessary to enable the plaintiff to recover. The provisions of the Public Health Act, 1875, are brought in here by ss. 56 and 57 of the Act of 1890: that is to say, in the case of schemes under the Housing Acts, 1890–1919, the local authority must contract in accordance with the provisions of the Public Health Act, 1875, one of which is (s. 174) that the contract must be under the seal of the corporation where the amount or value exceeds 50*l.* In *Baker* v. *Holme Cultram Urban Council* (3) Scrutton J. pointed out that the defendants in *Lawford* v. *Billericay Rural Council* (1), being a rural district council, were not within s. 174 of the Public Health Act, 1893, at all. *Lawford's Case* (1) therefore does not touch contracts by an urban district council, which are governed by s. 174.

BAILHACHE J., after stating the facts as above, continued: The serious objection to the present claim is that the contract was not under the common seal of the defendants. By the Public Health Act, 1875, s. 174, contracts entered into by an urban authority where the value or amount exceeds 50*l.*

. . . . to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of this Act . . . . to prepare and submit to the Local Government Board a scheme for the exercise of their powers under the said Part III. . . . ."

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174: "With respect to contracts made by an urban authority under this Act the following regulations shall be observed, namely, (1.) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority."

(1) [1903] 1 K. B. 772.

(2) [1913] 2 Ch. 407.

(3) (1915) 85 L. J. (K. B.) 799, 801.

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Bailhache J.

are required to be under seal. Upon this rule certain exceptions have been grafted, and in the case of *Lawford* v. *Billericay Rural Council* (1) the principle is laid down as set out in the headnote to the case in the Law Reports: "Where the purposes for which a corporation is created"—and to this I would add, "or where the duties imposed on the corporation by statute"—"render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

In *Lawford's Case* (1) the defendants were a rural district council and not an urban district council, and counsel for the defendants here argues that the case is distinguishable on this ground. [His Lordship read s. 56 of Part III. of the Housing of the Working Classes Act, 1890, and continued:] The powers given in that section to the local authority were optional only, but by the Housing, Town Planning, &c., Act, 1919, s. 1, these powers became a duty binding upon them. The defendants therefore are in the position of a corporation upon whom a statutory duty is imposed. It was moreover necessary that the work should be done here, as in *Lawford's Case*. (2) The work was done; quantity bills were sent in, tenders invited by the defendants, and the quantity bills put before builders to enable them to tender. If *Lawford's Case* (1) applies therefore, there is nothing to prevent the defendants from being held liable. I have already alluded to the provisions of s. 174 of the Public Health Act, 1875, and in *Baker* v. *Holme Cultram Urban Council* (2) Scrutton J. said: "In the former case"—*Lawford's Case*—"the defendants were a rural district council and not within s. 174 of the Act

(1) [1903] 1 K. B. 772. (2) (1915) 85 L. J. (K. B.) 799, 801.

at all." *Lawford's Case* is distinguishable on the same ground from the present case. But counsel for the plaintiff says that the Public Health Act does not apply here, because the housing scheme was prepared under the Housing Acts, 1890–1919, and not under powers contained in the Public Health Act, 1875. The answer to this is that s. 56 of the Act of 1890 conferred upon an urban district council the same powers as are given in the case of sanitary authorities under the Public Health Acts, and therefore the Public Health Act, 1875, s. 174, applies.

An urban district council acting under powers contained in the Housing Acts, 1890–1919, must therefore contract in the same manner as if it was contracting under the Public Health Act, 1875. If that is so, the defendants can only contract under their common seal in cases where the value or amount of the contract exceeds 50*l.*, and there being no contract under seal, the plaintiff here cannot recover.

Judgment for Defendants.

Solicitors for plaintiff: *Webster & Webster.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for John Atkinson, Erith.*

F. P. F.

1923
Oct. 17.

WILDRIDGE, APPELLANT *v.* ASHTON, RESPONDENT.

Adulteration—Milk—Method of taking Sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 13, 14.

A consignment of milk sent by the respondent to a purchaser was contained in three churns, containing respectively 12, 14 and 10 gallons. An inspector took a sample from each churn, had each sample separately analysed, and thereafter laid one information under the Sale of Food and Drugs Acts against the respondent in respect of the whole consignment. At the hearing of the information the certificates of the three analyses were put in, and the analyst gave evidence, based upon those analyses, as to the quantitative or true average of the constituents of the whole consignment of 36 gallons, and he stated that the method which had been adopted of taking the samples was at least as accurate as taking a sample from the contents of the three churns mixed together. The justices dismissed the information on the ground that the method of taking the samples was not proper and legal:—

Held, that the method adopted was proper and legal and that the justices were therefore wrong in dismissing the information.

CASE stated by Hull justices.

The appellant, an inspector of nuisances, preferred an information against the respondent for selling to the Farmers and Cleveland Dairies Co., Ld., milk not of the nature, substance and quality demanded, and to their prejudice, inasmuch as it contained extraneous solid matter—dirt—as a sediment, to the average extent of 3·9 parts by volume of moist sediment per 100,000 parts of the milk.

It was proved or admitted that the appellant attended at the Paragon Station, Hull, on January 25, 1923, and awaited the arrival of a train from Leeds by which a number of churns of milk were brought, three of which were consigned by the respondent to the Farmers and Cleveland Dairies Co., Ld., Hull. Attached to each of the three churns was a label in these terms: "3 cans—36 Imp. Galls. Jan. 25, 1923. Warranted genuine new milk with all its cream on. C. Ashton. To the Farmers and Cleveland Dairies Co., Ld., Hull." One of the three churns contained 12 gallons, another 14 gallons, and the third 10 gallons. The appellant opened the first of these churns, thoroughly mixed the contents with a metal plunger and put about three

pints into a jug; he then stirred the contents of the jug with a spoon and kept stirring whilst he poured the contents into three separate bottles, which he sealed and marked. He then opened the second and third churns, which contained 14 and 10 gallons respectively, and by an identical process filled three more bottles from each. On the same day he delivered one of each of the sets of bottles to the Hull City analyst, and packed and sent off one of each of the sets to the respondent, while the third of each set he produced in Court along with three certificates of the City analyst, which showed that the samples contained respectively 4·3, 4·4 and 2·7 parts by volume of moist sediment per 100,000 parts of milk, the sediment consisting partly of dung. Appended to each certificate was a statement that "clean milk shows less than two parts of moist sediment per 100,000 parts of milk, and is wholly free from dung." The City analyst gave evidence to the effect that the arithmetical average of dirt contained in the three samples was 3·8 by volume in 100,000 parts of milk, and that the quantitative or true average of dirt in the 36 gallons consignment was 3·9 per 100,000 parts of milk. He further stated that the perfect method of sampling in this case would be to mix together the whole volume of the consignment and take a sample of that, but there were practical difficulties in doing so, and, in his opinion, the method in fact adopted was at least as accurate as taking a sample from the bulk after being mixed together.

It was contended for the respondent that the formalities applicable to the taking of samples and the subsequent institution of proceedings required by the Sale of Food and Drugs Acts, 1879 and 1899, had not been properly complied with in that the samples taken by the appellant had been averaged, and that the appellant should have had either a separate information in respect of the milk in each of the three churns, or have mixed together the contents of the three churns, and then taken a sample from the bulk.

For the appellant it was contended that while he was entitled to take out a separate summons in respect of each

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sample, he was not bound to do so, and that the procedure in fact adopted was legal.

The justices, considering they were bound by the decision in the Scottish case of *Telford* v. *Fyfe* (1), dismissed the information on the ground that the sample was not properly and legally taken, and the question for the opinion of the Court was whether they were right in so holding.

du Parcq for the appellant. The appellant might, if he had chosen to do so, have laid separate informations in respect of each of the three churns: *Fecitt* v. *Walsh* (2), but he thought it fairer to the respondent to treat the three churns as one consignment, to take a sample from each churn, and to arrive at the quantitative or true average of extraneous solid matter in the whole consignment. The justices have said that a sample taken by this method was not legally taken. They considered that the contents of the whole consignment should have been mixed before a sample was taken, or else, following an opinion expressed by Lord Ardwall in *Telford* v. *Fyfe* (3), that the samples taken from the three churns should have been mixed before being analysed. In the later Scottish case of *Lamont* v. *Rodger* (4), where the method of sampling was practically the same as in this case—five samples being taken and the average of the separate analyses treated as representing the quality of the whole consignment—it was held that this was a fair method of sampling. Lord Ardwall was a party to that decision, and, although saying that personally he should have preferred the samples being mixed before analysis, he agreed that the method in fact adopted was perfectly fair and that no prejudice was suffered by the person charged. In view of that decision and of the evidence in this case that the method of sampling was at least as accurate as taking a sample from the bulk after being mixed together, the justices were wrong in holding that the sample was not properly and legally taken.

O'Malley (*Frampton* with him) for the respondent. The

(1) 1908 S. C. (J.) 83.
(2) [1891] 2 Q. B. 304.
(3) 1908 S. C. (J.) 83, 88.
(4) 1911 S. C. (J.) 24.

justices were right in holding that the samples were not taken in a proper and lawful manner. The appellant could have adopted the procedure followed in *Fecitt* v. *Walsh* (1) and laid separate informations in respect of each of the churns. If he did not do that his only alternative course was to treat the three churns as one consignment, mix the contents of those churns and take a sample from the bulk. Sect. 13 of the Sale of Food and Drugs Act, 1875, contemplates one sample being taken of the article sold, not a number of samples and analyses followed by an averaging of the results. Reliance is not placed upon the Scottish cases referred to.

[He cited *Goulder* v. *Rook* (2) and *Hudson* v. *Bridge*. (3)]

du Parcq replied.

LORD HEWART C.J. stated the facts and continued: The sole question for decision is whether the samples of milk were taken in a proper and lawful manner. It is not suggested that there were not materials for a conclusion adverse to the respondent if a sample had been taken from the bulk mixed together or if an analysis had been made of the samples mixed together, but it is contended that the whole method was faulty, because a sample was taken from each of the three churns and each of the samples so taken was separately analysed. For the proposition that the only proper and lawful course in such a case was to begin by mixing together all the 36 gallons there is no support whatever. The justices appear to have thought that certain observations of Lord Ardwall in *Telford* v. *Fyfe* (4) supported that view, but when that case is carefully looked at it will be found that it is no authority for the proposition. It is quite true that Lord Ardwall used words to the effect that in that particular kind of case—not a case of this kind—a fair method of procedure would be to mix the samples before analysis. When, however, the later Scottish case of *Lamont* v. *Rodger* (5) is looked at it becomes apparent that even that

(1) [1891] 2 Q. B. 304.
(2) [1901] 2 K. B. 290.
(3) (1903) 19 Times L. R. 369.
(4) 1908 S. C. (J.) 83.
(5) 1911 S. C. (J.) 24.

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more limited proposition is not to be regarded as having the authority of the Scottish Court. In my opinion there is no legal foundation for the view taken by the justices. The samples were taken in the only practicable way, and it is not to be suggested that the contents of the whole of the churns can, while they are in course of delivery, be mixed together. The contention that that should have been done was put forward before the justices, but not, I think, very seriously. The real argument that weighed with the justices was that the samples should have been mixed before analysis—an argument for which I can see no ground, especially when it appears from the evidence given that the result obtained by an intelligent examination of the three analyses is at least as accurate as would have been the result obtained by an examination of a sample taken from the whole of the samples mixed together. In those circumstances it seems to me that the justices were wrong in law in the view they took, and, accordingly, the case must go back with a direction to that effect.

SANKEY and SALTER JJ. concurred.

Appeal allowed. Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. A. Learoyd, Hull.*

Solicitors for respondent: *Smith & Hudson, for Laverack, Wray & Co., Hull.*

J. S. H.

GILL, APPELLANT *v.* MELLOR, RESPONDENT.

GILL, APPELLANT *v.* MONDAY, RESPONDENT.

1923
Oct. 18.

Rates—Poor Rate—General District Rate—Demand for Payment made after Expiration of Year in which Rate was Laid—Proceedings to recover Payment—Sustainability—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *ss.* 1, 2—*Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 11—*Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 5—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 210, 211, 222, 256.

Demands for payment of poor rate and general district rate were made after the expiration of the year in which the rates were laid, and proceedings were subsequently taken to recover payment thereof, but the justices refused to make any order, as the demands for payment were not made nor the proceedings taken within the year in which the rates were laid:—

Held, that the justices were wrong, as there was no requirement as to the time within which the demand for payment of either rate must be made.

CASES stated by justices for the West Morley Division of the West Riding of the County of York.

At the Court of summary jurisdiction at Halifax a complaint was preferred by the appellant, Harry Leslie Gill, of Stainland, in the said Riding, assistant overseer and rate collector, against the respondent David Mellor under 12 & 13 Vict. c. 14 alleging that he, being a person duly rated and assessed to the relief of the poor in the parish of Stainland with Old Lindley in and by a rate made on April 2, 1921, in the sum of 1*l.* 15*s.* 5*d.*, had not paid the same or any part thereof, but had refused to do so.

Another complaint was preferred by the appellant Gill against the respondent Susannah Monday, alleging that she, being a person duly rated and assessed to the general district rate for the urban district of Stainland in and by a rate made on March 31, 1921, in the sum of 1*l.* 6*s.* 6*d.*, had not paid the same or any part thereof, but had refused to do so.

Upon the hearing of the informations on March 24, 1923, the following facts were proved:—

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(*a*) That the said poor and general district rates were duly made and that the respondents Mellor and Monday were assessed therein as aforesaid.

(*b*) That demands for payment of the sum of 1*l.* 15*s.* 5*d.*, being the amount to which the respondent Mellor was assessed in the said poor rate, and of the sum of 1*l.* 6*s.* 6*d.*, being the amount to which the respondent Monday was assessed in the said general district rate, were duly made on the two respondents on September 26, 1922.

(*c*) That the said sum of 1*l.* 15*s.* 5*d.* was brought forward into the poor rate made on April 1, 1922, as arrears recoverable from the respondent Mellor, and that the said sum of 1*l.* 6*s.* 6*d.* was brought forward into the general district rate made on March 30, 1922, as arrears recoverable from the respondent Monday.

(*d*) That the respondent Mellor had neglected and refused to pay the said sum of 1*l.* 15*s.* 5*d.*, and that the respondent Monday had neglected and refused to pay the said sum of 1*l.* 6*s.* 6*d.*

(*e*) That the summonses to appear at the Court were duly served on the two respondents on or about March 15, 1923.

On the part of the appellant it was contended that orders for payment of the said sums of 1*l.* 15*s.* 5*d.* and 1*l.* 6*s.* 6*d.* ought to be made, as no time was limited for making the demands for payment, and the poor rate might be collected after the period of the rate, and the proceedings to recover payment of the general district rate were commenced within six months of the demand.

On the part of the two respondents it was contended that the demands for payment were made after the year for which the rates were laid had expired, and that no orders for payment ought to be made.

The justices, being of opinion that the demands for the said sums of 1*l.* 15*s.* 5*d.* and 1*l.* 6*s.* 6*d.* and also proceedings to recover payment thereof should have been made and

taken within the year in which the said rates were laid, and that they had no power to make the orders for payment as asked, refused to make any order, and dismissed the said complaints.

The question upon which the opinion of the Court was desired was whether the justices came to a correct determination and decision in point of law.

There were also five other cases stated, three of which related to proceedings for the recovery of the poor rate, and two to proceedings for the recovery of the general district rate, all of which cases were dealt with at the same time.

W. E. P. Done for the appellant. The obligation to pay the poor rate arises whether it has been demanded or not. When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it: *Davis* v. *Burrell* (1), per Jervis C.J. The Poor Relief Act, 1601 (43 Eliz. c. 2), by s. 1 provided for the levying of a rate by the overseers for the relief of the poor. At the end of their year of office the overseers were required to make to two justices a true account of all sums of money received by them or rated and assessed and not received, and to deliver up the money in their hands to the newly appointed churchwardens and overseers. By s. 2 the churchwardens and overseers were empowered to levy certain sums of money and all arrearages of every one that shall refuse to contribute according as they should be assessed, by distress and sale of the offender's goods. Therefore it is necessary to show that there has been a demand and a neglect or refusal to pay before levying a distress. Sect. 11 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38), provides that where any person has neglected or refused to pay to the overseers any sum of money that he may be rated or assessed to, the successors of the overseers who made the rate are required to levy such arrears and to reimburse their predecessors. That shows that there

(1) (1851) 10 C. B. 821, 826.

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is an obligation to levy arrears of poor rate after the year for which it was made has expired. In *Reg.* v. *Blenkinsop* (1) it was held that a demand was validly made and proceedings taken to recover payment of a rate several years after it was made. Under s. 5 of the Distress for Rates Act, 1849, upon proof that a summons for non-payment of rates has been duly served upon the person assessed the justices can proceed ex parte. There is no provision in either of these Acts requiring that the demand should be made at any particular time.

The making and levying of the general district rate is governed by the Public Health Act, 1875. Sect. 210 provides for the making and levying of a general district rate, s. 211 says who the rate is to be levied upon, s. 222 provides for the publication and collection of the rate, and s. 256 provides for the recovery of rates in arrear by summary proceedings after a lawful demand. But there is no provision that the lawful demand must be made within the year for which the rate was made. It is expressly stated in Halsbury's Laws of England, vol. xxiv., p. 21, that no time is limited for the demand.

The respondents did not appear.

LORD HEWART C.J. The group of cases stated by the justices may be divided into two parts, one part consisting of cases concerned with the poor rate and the other part consisting of cases concerned with the general district rate. In the one set of cases as in the other the same question arises—namely, whether when proceedings are taken for the recovery of unpaid rates the justices have power to make an order for payment notwithstanding that no demand for payment of the rate was made within the year which the rate was intended to cover. In all the cases no demand was made upon the individual ratepayer until the expiration of something like six months after the conclusion of the year with which the rate was concerned, and the justices in all the

(1) [1892] 1 Q. B. 43.

cases were of opinion that the demand should have been made, and also that the proceedings should have been taken, within the year for which the rate was made, and they held as a matter of law that they had no power to make an order for payment as the condition precedent had not been fulfilled. The question is whether the justices were right in so holding. I am satisfied that the justices were not right in point of law.

I will deal first with the question arising upon the poor rate. In *Davis* v. *Burrell* (1) Jervis C.J. in giving judgment said: "When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it. Here, the plaintiff has entered into a covenant to pay rates, and he has broken that covenant. The stat. 43 Eliz. c. 2 requires a personal demand before the rate can be distrained for. That shows that a demand would otherwise be unnecessary." Apart therefore from the statutory requirement for a demand in the case of an attempt to recover by distress warrant payment of a rate which should have been but has not been paid, there is no requirement for a demand. Nor when a demand is made is there any requirement as to the time when the demand should be made. I think it is clear from the decision in *Reg.* v. *Blenkinsop* (2) that there is no ground for reading into the law a requirement that a demand for payment of the rate must be made within the year for which the rate was made. Similarly when one looks at the provisions of the statutes dealing with the recovery of the poor rate there is an absence of any provision requiring that the demand should be made within the year.

With regard to the general district rate, the provisions as to the making of the rate, the demand and the mode of collecting it are to be found in ss. 210, 211, 222 and 256 of the Public Health Act, 1875. Equally do these provisions fail to contain any requirement that the demand must be made within the year for which the rate was made.

(1) 10 C. B. 821, 826. (2) [1892] 1 Q. B. 43.

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The justices were therefore wrong in point of law, and the cases must go back to them with a direction that a demand within the year is not necessary. The answer as to the necessity for proceedings to recover payment of the rate being taken within the year is a fortiori.

SANKEY and SALTER JJ. concurred.

Appeals allowed. Cases remitted.

Solicitors for appellant: *Robbins, Olivey & Lake, for Longbotham & Sons, Halifax.*

R. F. S.

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Oct. 19.

GRIFFITHS, APPELLANT *v.* STUDEBAKERS, LIMITED, RESPONDENTS.

Motor Car—Limited Trade Licence—Contravention of Terms of Licence—Liability of Holder of Licence for Act of Servant—Roads Act, 1920 (10 & 11 *Geo.* 5, *c.* 72), *s.* 12—*Road Vehicles* (*Trade Licences*) *Regulations,* 1922, *dated December* 14, 1922.

Sect. 12 of the Roads Act, 1920, authorizes the Minister of Transport to make regulations for carrying the Act into effect, and the section imposes a penalty upon any person who acts in contravention of, or fails to comply with, any regulation so made.

By the Road Vehicles (Trade Licences) Regulations, 1922, made under the foregoing section, limited trade licences may be issued. Subject to the observance and fulfilment of certain conditions, the holder of such a licence may use a motor car for which the licence is appropriate on a public road for certain specified purposes, "provided that not more than two persons in addition to the driver shall be carried" thereon.

A motor car belonging to the respondents, who were the holders of a limited trade licence in respect of it, was driven on a public road by one of their servants, and more than two persons were in the car in addition to the driver, this being without the knowledge, and contrary to the express orders, of the respondents, who had taken all reasonable precautions to prevent a contravention of the Regulations:—

Held, that mens rea was not an essential ingredient of the offence in respect of a contravention of the Regulations, and that the respondents were liable to the penalty imposed by s. 12 of the Roads Act, 1920.

CASE stated by Hampstead justices.

The respondents, who were the holders of a limited trade

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licence, were summoned for having used on a public road on March 8, 1923, a motor car, and carrying thereon more than two persons in addition to the driver, in contravention of the Road Vehicles (Trade Licences) Regulations, 1922.

It was proved that a car belonging to the respondents, bearing a limited trade licence plate, was being driven on a public road by one Rumming, an employee of the respondents, that more than two persons were in the car with him, and that on being asked why he was carrying more than the limited number of persons, Rumming said: "I am giving them a trial run"; that it was without the knowledge of the respondents or any responsible officer of the company and contrary to express orders that Rumming was carrying more than two persons in addition to himself; and that the respondents had taken all reasonable precautions against the commission of the offence against the Regulations.

An information against Rumming for aiding and abetting the commission of the offence by the respondents was heard at the same time.

The justices, holding that the respondents had committed no offence, dismissed the information, and being of opinion that only the holder of the limited trade licence could commit the principal offence and having dismissed the information against the holders of the licence, they further decided to dismiss the information against Rumming.

The question was whether the justices were right in so holding.

Travers Humphreys and *Ronald Powell* for the appellant. By s. 12 of the Roads Act, 1920, the Minister of Transport is authorized to make Regulations for carrying the Act into effect, and a penalty is imposed upon any person acting in contravention of, or failing to comply with, the Regulations. By the Road Vehicles (Trade Licences) Regulations, 1922, dated December 14, 1922, Regulations have been made by the Minister as to (inter alia) the grant of limited trade licences. By reg. 4, art. B. (1.), of those Regulations it is provided that "Subject to the observance and fulfilment of the provisos

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hereinafter contained the holder of a limited trade licence may use any vehicle for which such licence is appropriate on a public road under that licence . . . . for test or trial for the benefit of a prospective purchaser. . . . . Provided that (*a*) not more than two persons in addition to the driver shall be carried upon a vehicle which is being used upon a public road under a limited trade licence, each such person being either an employee . . . . or a prospective purchaser for whom a test is being made. . . . . " The question is : Was it necessary to show mens rea on the part of the respondents ? It is submitted that it was not in view of the terms of the regulation.

[They were stopped.]

E. J. Purchase K.C. and *F. E. Sugden* for the respondents. Prima facie, in order to constitute an offence, mens rea must be shown. No doubt the Legislature may by the language which it has used make it unnecessary for the prosecution to show mens rea, but the clearest words are necessary for this purpose, and it is submitted that they have not been used here. The respondents have not been guilty of any failure to comply with the regulation ; they in fact did all they could to secure compliance with the conditions of the licence. No doubt civilly they would be liable for the act of their servant, but they are not liable criminally. It is conceded that if the respondents should have been convicted, the driver was liable as an aider and abettor.

Travers Humphreys in reply cited *Mousell Bros.* v. *London and North Western Ry. Co.* (1)

LORD HEWART C.J. [having stated the facts and read s. 12 of the Roads Act, 1920, and reg. 4, art. B (1.), of the Road Vehicles (Trade Licences) Regulations, 1922, continued :] It is said on behalf of the respondents that if the question were one of civil liability they would no doubt be liable for the acts of their servant, but that they are not liable to be convicted, inasmuch as they took precautions to prevent

(1) [1917] 2 K. B. 836.

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the breach of the Regulations which was committed. This argument approaches the matter from the wrong standpoint. The respondents received a limited trade licence in respect of this car, and by virtue of that licence they could use it for particular purposes if they observed certain conditions; if they failed to observe those conditions and used the car they contravened the Regulations. It is said that they did not commit the breach alleged, as the act complained of was that of their servant. Two observations may be made upon that argument. It is quite clear that the limited company as a company could not drive the car, and secondly, it is not disputed that the employee who was driving the car on the day in question was in fact upon the respondents' business and was acting within the scope of his employment; in short, he was doing the very thing which for the advantage of the respondents he was employed to do. The only respect in which he fell short of the requirements of his employers was that, contrary to their wish, expressed in certain ways, he was carrying an excessive number of persons in the car. In those circumstances it seems clear to me that the act of the driver was the act of the respondents. In *Mousell Bros.* v. *London and North Western Ry. Co.* (1) Atkin J. said: "I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed. If authority for this is necessary it will be found in the judgment of Bowen L.J. in *Reg.* v.

(1) [1917] 2 K. B. 845.

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Tyler (1)." Applying those observations to the present case, I may summarise the matter thus: the statute and Regulations require that if a motor car is used upon a highway it must be duly licensed; for the benefit of manufacturers of motor cars, who wish to use a car for a special purpose in the way of their trade, limited trade licences are issued, but to the use of cars covered by such licences conditions are attached. It would be fantastic to suppose that a manufacturer, whether a limited company, a firm, or an individual, would, even if he could, always show cars to prospective purchasers himself; and it would defeat the scheme of this legislation if it were open to an employer, whether a company, a firm, or an individual, to say that although the car was being used under the limited licence in contravention of the conditions upon which it was granted: "My hand was not the hand that drove the car." On these facts there ought to have been a conviction of the respondents and also of the driver as an aider and abettor.

SANKEY J. I agree. The law on this matter was laid down by Wright J. in *Sherras* v. *De Rutzen* (2), where he said: "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered." What are the nature and subject-matter of the statute and Regulations with which we are concerned? They deal (inter alia) with limited trade licences, licences obtainable by motor-car manufacturers at a lower rate for the purposes of their trade. The respondents, holding a licence of that limited character, were entitled to use their car for trade purposes on certain conditions being fulfilled. Failure to observe these conditions subjected them to a penalty. The respondents with this licence were using through their servant a car for trade purposes—namely, to be shown

(1) [1891] 2 Q. B. 588, 592. (2) [1895] 1 Q. B. 918, 921.

to prospective purchasers—and it appears to me that they failed to observe one of the conditions imposed, the condition that not more than two persons, besides the driver, should be in the car at that time. In my view there ought to have been a conviction.

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SALTER J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondents: *Engall & Crane.*

J. S. H.

SANDEMAN, APPELLANT *v.* GOLD, RESPONDENT.

1923
Oct. 19.

Merchandise Marks—False Trade Description—"Tarragona port"—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2, 3—*Anglo-Portuguese Commercial Treaty Act*, 1914 (5 *Geo.* 5, *c.* 1), *s.* 1—*Anglo-Portuguese Commercial Treaty Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 39), *s.* 1.

By the Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916, the description "port" applied to any wine other than wine the produce of Portugal which, on importation into the United Kingdom, is accompanied by a certificate that it is a wine to which by the law of Portugal the description "port" may be applied, is to be deemed to be a false trade description within the Merchandise Marks Act, 1887.

The respondent sold a bottle of red Spanish wine known as "Tarragona" bearing a label with the words "Tarragona Port." "Tarragona" is not port, and the wine sold was not port but "Tarragona":—

Held, that the respondent had applied a false trade description to the wine, as the Acts prohibit the unauthorized use of the word "port" either alone or when qualified by another word.

CASE stated by Surrey justices.

The respondent was charged with having sold a bottle of wine to which was then applied a false trade description—namely, "Tarragona Port"—contrary to the Merchandise Marks Act, 1887 (1), and the Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916. (2)

(1) Merchandise Marks Act, 1887, s. 2, sub-s. 1, makes it an offence to apply any false trade description to goods.

Sect. 3, sub-s. 1, provides that "the expression 'trade description' means any description, statement, or other

(2) For note (2) see next page.

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It was proved or admitted that the respondent, who was the manager of a brewery company's shop and was licensed to sell wine for consumption off the premises, sold to an employee of Sandeman & Co. a quart bottle of red Spanish wine known as "Tarragona" bearing a label on which the words "Tarragona Port" were printed; that "Tarragona" is not port; and that the wine sold was not port but "Tarragona."

It was contended for the respondent that it was not a false trade description to apply the word "port" to a wine other than the produce of Portugal where the word "port" was qualified by another word such as "Tarragona," which clearly indicated that the wine so described was, although of a port-like character, not the produce of Portugal, but of some other defined locality.

It was contended for the appellant that the description of a wine as "Tarragona port" was none the less a description of it as "port" although preceded by the word "Tarragona," and was a false trade description.

The justices upheld the respondent's contention and dismissed the information.

Thorn Drury K.C. and *Monier-Williams* for the appellant. The effect of the Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916, is to prohibit absolutely the use of the word

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indication, direct or indirect, ... (*b*) as to the place or country in which any goods were made or produced, or . . . . (*d*) as to the material of which any goods are composed. . . . . The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied. . . . ."

(2) Anglo-Portuguese Commercial Treaty Act, 1914, s. 1: "The description 'port' . . . . applied to any wine or other liquor other than wine the produce of Portugal . . . . shall be deemed to be a false trade description within the meaning of the Merchandise Marks Act, 1887. . . . ."

Anglo-Portuguese Commercial Treaty Act, 1916, s. 1, sub-s. 1: "The description 'port' applied to wine the produce of Portugal, ... shall be deemed to be a false trade description within the meaning of the Merchandise Marks Act, 1887, if the wine on importation into the United Kingdom was not accompanied by a certificate issued by the competent Portuguese authorities to the effect that it was a wine to which by the law of Portugal the description 'port' may be applied. . . . ."

"port" as applied to wine other than the produce of Portugal accompanied by the proper certificate.

[LORD HEWART C.J. Suppose the respondent had sold some wine in a bottle bearing the label "Whitechapel Port." Would that be applying a false trade description?]

Yes; the Acts provide that the word "port" must not be used except to designate Portuguese wine; and the word is in fact improperly used in the case supposed and in this case, although it is preceded by another word. The fact that such a description involves a contradiction in terms affords no answer: *Holmes* v. *Pipers*. (1)

[They were stopped.]

Barrington-Ward K.C. and *R. O. B. Lane* for the respondent. Tarragona wine has long been well known in the trade as a wine of a port-like character: see *Hooper* v. *Riddle & Co.* (2) and *Holmes* v. *Pipers* (1), and the question is whether the Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916, are to be construed as prohibiting the sale of a well-known wine with the word "port" accompanied by the controlling word "Tarragona." The Acts, the object of which is to ensure that "port" shall be taken to be a wine not compounded in this country but a wine that comes from Portugal, must be construed strictly, and if it had been intended that they should strike at the circumstances of this case they should, in terms, have prohibited the use of the word "port" either alone or when accompanied by a controlling word. It is no offence to describe an article by its accepted trade name. To describe a wine as "Australian port" or as "Spanish burgundy" cannot be an infringement of the Merchandise Marks Act.

LORD HEWART C.J. stated the facts and continued: Even before 1914 it might have been difficult to justify such a sale as that which forms the subject of these proceedings. In *Holmes* v. *Pipers* (1) Bailhache J. said: "The argument is frequently put forward in these cases that if, taking the whole of the description, a contradiction in terms is found,

(1) [1914] 1 K. B. 57, 64. (2) (1906) 95 L. T. 424.

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it is absurd to suppose that any one can be deceived, and therefore the description cannot be a false trade description. It is said in this case that there is a contradiction in terms between the words 'British' and 'Tarragona.' The vice of the argument, however, is that it assumes too much knowledge on the part of the purchaser of this class of article." That case was decided in October, 1913, and in November, 1914, the Anglo-Portuguese Commercial Treaty Act, 1914, was passed giving effect to the treaty set out in the Schedule. Sect. 1 of the Act says that the description "port" applied to any wine or other liquor other than wine the produce of Portugal shall be deemed to be a false trade description within the meaning of the Merchandise Marks Act, 1887. In my opinion that section has made impossible the kind of argument put forward on behalf of the respondent. The question is, was the word "port" applied to the contents of this bottle? If it was, and the wine was not the produce of Portugal, the word must be deemed to be a false trade description. It is said that this gives too rigorous a meaning to the Act of 1914, and reference is made in support of this contention to the later Act, the Anglo-Portuguese Commercial Treaty Act, 1916. But, in my view, the later Act adds to, and subtracts nothing from, the earlier one. The Act of 1914 having said that wine called "port" must be wine coming from Portugal, the Act of 1916 says that not only must the wine described as "port" come from Portugal, but there must be a certificate from the competent Portuguese authorities to the effect that it is a wine to which by the law of Portugal the description "port" may be applied. In view of those provisions the respondent's contention is wrong and the justices must be directed to convict.

SANKEY J. I agree. The point at issue depends upon the proper answer to this question: Was the description "port" applied to this red Spanish wine? In my view the description "port" was applied to it. Mr. Barrington-Ward for the respondent says that it was called "Tarragona port," but none the less, in my view, the word "port" was applied to

it, and that is to be deemed to be a false trade description. I agree that the appeal should be allowed.

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SALTER J. I am of the same opinion. The Acts of 1914 and 1916 were passed to prevent the kind of contention raised in this case.

Appeal allowed. Case remitted.

Solicitors for appellant: *Monier-Williams & Milroy.*
Solicitors for respondent: *Hunters.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1923
Oct. 15.

PERLAK PETROLEUM MAATSCHAPPIJ *v.* DEEN.

[1923. P. 260.]

Practice—Interrogatories—Proof of Foreign Law—Person interrogated not an Expert—Admissibility.

An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law.

APPEAL from chambers.

The action was brought on a foreign judgment, the statement of claim alleging that the plaintiffs were a Dutch company, that the defendant had been the managing director of the company, and that by a judgment of the District Court of the Hague, a Court duly constituted in accordance with the laws of the kingdom of Holland and having jurisdiction in that behalf, which judgment was in accordance with the laws of the said kingdom, the plaintiffs were held entitled to recover against the defendant and the defendant was ordered to pay to the plaintiffs the sum of 4,786,200 florins, but that the defendant had neglected to pay the same. The defendant in his defence traversed the validity of the said judgment. Thereupon the plaintiffs proposed to administer to the defendant the following interrogatories amongst others :—

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5. Is not the District Court of the Hague a Court duly constituted in accordance with the laws of Holland? If nay, in what respect is it not so constituted?

6. Had not the District Court of the Hague jurisdiction to entertain the suit in which the judgment now sued on was given or to give the said judgment? In what respect do you say the Court had no jurisdiction? Have you at any time and if so when and how objected to the jurisdiction of the Court to entertain the said suit?

The Master at chambers allowed the interrogatories in question upon the ground that questions of foreign law are treated in our Courts as questions of fact, and on appeal Swift J. affirmed the Master's order. The defendant appealed to the Court of Appeal.

Neilson K.C. and *Fortune* for the appellant. No doubt questions of foreign law are always regarded as questions of fact, but they are facts which can only be proved by experts in that law. In *Phillips* v. *Barron* (1), which was an action for refusal to accept goods sold, interrogatories delivered to the plaintiff on certain questions of French law were struck out by Archibald J. on the ground that the plaintiff was not an expert in French law. In *Concha* v. *Murrieta* (2) Cotton L.J. said: "In our Courts foreign law is a matter of fact to be decided on evidence, and the proper evidence is that of experts, that is to say, of advocates practising in the Courts of the country whose law our Courts want to ascertain."

[SCRUTTON L.J. Is it necessary that the witness should be a person practising in the foreign Court? A certain member of our Bar, on the North-Eastern Circuit, who had been called to the Italian Bar but had never practised in the Italian Courts, was always allowed to give evidence on questions of Italian law.]

Still the witness must be a skilled expert, and there is no evidence that the defendant answered that description.

R. A. Wright K.C. and *Micklethwaite* for the respondents.

(1) [1876] W. N. 54. (2) (1889) 40 Ch. D. 543, 550.

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These interrogatories are not inadmissible. It is for the defendant to say in his answer that he is not an expert and does not know what the law is. There is no reported case in which interrogatories of this kind have ever been struck out except *Phillips* v. *Barron* (1), and that was only a decision at chambers which, for all that appears to the contrary, has never been followed. Moreover an interrogatory is not limited to matters within the personal knowledge of the person interrogated; he is bound to make inquiry and disclose any information that he may thereby obtain, unless it was obtained in a manner involving legal professional privilege. But that is a matter for the party interrogated to show in his answer. If however these interrogatories are not admissible as such, the plaintiffs are willing to treat them as a demand for further and better particulars, that is to say are willing that the defendant should answer them not upon oath, and after the making of the order by Swift J. they by letter notified the defendant of their willingness to do so, but the defendant in reply declined to answer them at all. In the old Court of Chancery it was not the practice for a plaintiff to obtain particulars of the defendant's case by means of a summons for particulars, but he was allowed to get the information by introducing into his interrogatories questions directed to that object, that is to say he obtained the particulars upon oath. And that has been held since the Judicature Act to be still permissible. In *Saunders* v. *Jones* (2) James L.J., speaking of particulars of misconduct in an action for wrongful dismissal of a servant, said: "The only mode in which those particulars could have been got in Chancery was by administering interrogatories, and I am of opinion that a party may still adopt that course, and that the interrogatories must be answered." And that statement of the law was accepted by Jessel M.R. in *Benbow* v. *Low*. (3) It is no doubt a saving of expense to include the demand for particulars in the interrogatories instead of taking out a separate summons. Therefore even if these interrogatories,

(1) [1876] W. N. 54. (2) (1877) 7 Ch. D. 435, 449.
(3) (1880) 16 Ch. D. 93, 97.

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5 and 6, are to be regarded as a demand for particulars, the plaintiffs are strictly entitled to have them answered upon oath, but they are willing to waive their strict right and have them answered not upon oath.

BANKES L.J. I think that, with the exception of the last sentence in No. 6, the interrogatories objected to should be disallowed. The action is brought to recover a large sum of money upon a foreign judgment against a defendant with regard to whom the only information given is that he was, before 1915, managing director of the plaintiff company, which is a company, according to the statement of claim, carrying on business at The Hague in the kingdom of Holland. The defendant in his defence puts in issue the validity of the judgment by a general denial. Mr. Micklethwaite endeavours to support these interrogatories partly on the ground that they are a convenient substitute for particulars. I do not desire for a moment to challenge the authority of the cases which he has cited, because it cannot be disputed that interrogatories may, even where they go to discovery of the case of the party interrogated, be allowed under certain circumstances, if it can be shown that they are a convenient substitute for particulars. But in this case if an application had been made for particulars it ought not to have been granted, because the defendant has contented himself with a general denial of the plaintiffs' case and has not set up any case of his own to which an order for particulars would be applicable. Then if those questions which have been asked of the defendant cannot be treated as an application for particulars can they be allowed as interrogatories ? The Master seems to have thought that the answer depended upon the question whether the interrogatories related to matters of law or to matters of fact, and that if they related to the latter they were admissible, if to the former they were not. But, in my opinion, that is by no means the whole question. No doubt it is well established that questions of foreign law are treated in the Courts of this country as questions of fact, but they are questions of fact upon which only certain classes of persons are competent to

speak. [His Lordship read interrogatories 5 and 6.] Those interrogatories, except the last sentence of No. 6, relate to matters of foreign law, and the party interrogating has not shown that the person interrogated is a competent witness on such a matter. In my opinion, the application for leave to administer these interrogatories should have been refused except in respect of the last sentence of interrogatory 6. To that extent the appeal must be allowed.

SCRUTTON L.J. It is curious that, except in one case, reported only in the Weekly Notes just after the Judicature Act came into operation, the present question does not seem to have been raised. The question is this: A plaintiff is allowed to prove his case by asking the defendant to answer questions of fact on oath, and the defendant must do more than answer on his own knowledge, he must answer as to his information and belief, making proper inquiries of his servants and agents, subject to this, that he is not bound to disclose in his answer information which has been obtained by his professional advisers. In those circumstances what is the position where it is necessary for the plaintiff's case to prove a matter of foreign law? Here the plaintiffs seek to recover upwards of half a million sterling on a foreign judgment; the defendant denies generally the validity of that judgment and puts the plaintiffs to the proof of their case. Thereupon the plaintiffs administer to the defendant interrogatories as to the law of Holland. Now I think it is quite clearly established by the ruling of the House of Lords in the *Sussex Peerage Case* (1) that the only witnesses whose evidence is admissible to prove foreign law are such as come "within the description of a person peritus" in that law. In *Concha* v. *Murrieta* (2) Cotton L.J. cited with approval as a correct statement of the rule a passage from the headnote to *Bremer* v. *Freeman* (3), where it is stated that "foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law." I am not going in this case to define the exact limits of "experts

(1) (1844) 11 Cl. & F. 85, 134. (2) 40 Ch. D. 543, 550.
(3) (1857) 10 Moo. P. C. 306.

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skilled in such law," but I think it is clearly not enough to say that the witness in fact knows what the law is with respect to the point in dispute; you must be able to show that he is a person who, by reason of his being generally skilled in the law of the foreign country, may be expected to know the answer to the particular question upon which information is sought. In *Reg.* v. *Dent* (1), where it was desired to prove a matter of Scotch law by the mouth of a witness who was objected to on the ground that he was not a member of the legal profession, and it was answered that it was not necessary to his admissibility as a witness that he should be of any particular profession if he satisfied the judge that he had in fact sufficient knowledge, Wightman J. adopted that argument and admitted the witness. But in the *Sussex Peerage Case* (2) Lord Lyndhurst, after the House of Lords had consulted the judges upon the point, said: "I ought to say at once, that it is the universal opinion both of the judges and the Lords, that the case (*Reg.* v. *Dent* (1)), as represented to have been decided by Mr. Justice Wightman, is not law." That I take to be a decision of the highest tribunal that it is not enough to show that the man in fact knows; you must show that he is one who, from his training, may be expected to know. In the present case there was no suggestion that the person interrogated was one who might be expected to know the Dutch law. All that we are told about him in the pleadings is that he was the managing director of a company. During the course of the argument I had some little doubt whether the question as to the Dutch law might not be put to the witness, it being left to him to say that he was not competent to answer, or whether it was not for the party interrogating to first establish that the person interrogated is a competent witness, but I have come to the conclusion, therein agreeing with my Lord, that the latter is the true view.

No attempt was made by the plaintiffs to show that Mr. Deen was personally competent to answer these interrogatories, or that he has any agents, other than agents whose statements in that respect would be privileged, who are in a position to

(1) (1843) 1 Car. & K. 97. (2) (1844) 11 Cl. & F. 85, 134.

inform him as to the Dutch law. Under those circumstances I agree that both these interrogatories, 5 and 6, with the exception of the last paragraph of No. 6, should be struck out.

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Appeal allowed.

Solicitors for the appellant: *Morley, Shirreff & Co.*
Solicitors for the respondents: *Freshfield, Leese & Munns.*

J. F. C.

QUEEN'S CLUB GARDENS ESTATES, LIMITED *v.* BIGNELL.

1923
April 18, 19; *May* 2, 10.

Landlord and Tenant — Weekly Tenancy — Notice to quit — Date of Expiration of — Requirement of Possession "on or before which date" — Ambiguity.

In order that a weekly tenancy may be determined by a notice to quit, the notice must be one which expires at the end of a periodic week from the commencement of the tenancy.

A weekly tenancy ran from Saturday in each week to the same day in the next week. The landlords on a Friday served upon the tenant a notice to quit, which was expressed to be "the requisite week's notice for the termination of your tenancy one week from Monday next":—

Held, that the notice to quit was invalid, inasmuch as it was not a notice expiring at the end of the weekly term.

Jones v. *Mills* (1861) 10 C. B. (N. S.) 788 principle applied.

Simmons v. *Crossley* [1922] 2 K. B. 95 discussed and dissented from.

Harvey v. *Copeland* (1892) 30 L. R. Ir. 412. Discussed and explained. Decision of the majority of the Court disapproved by Lush J.

Skelly v. *Thompson* (1911) 45 Ir. L. T. 138 disapproved.

Where a notice to quit specifies the date for which it may properly be given, and adds "on or before which date they [the landlords] will require vacant possession": *Quaere*, per Lush J., whether these words do not render the notice void for uncertainty.

APPEAL from Brompton County Court.

The plaintiffs, the Queen's Club Gardens Estates, Ld., were the owners of an estate at Fulham comprising upwards of six hundred residential flats, which they let to tenants. In order to keep all the flats constantly in repair it was necessary for the plaintiffs to employ a resident electrical engineer and a resident plumber. In 1898 the defendant, Harry

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Wallace Bignell, was employed to assist these officials. Afterwards by an agreement dated July 7, 1908, the plaintiffs let to the defendant the house No. 34A Musard Road, Fulham, which was on their estate, for one year at the yearly rent of 44*l.* 4*s.*, payable by weekly payments of 17*s.* When the year ended the defendant held over and continued to reside in the house on these terms. In 1910 the defendant was appointed assistant electrical engineer and was told that thereafter while he held that position he would have to reside on the premises.

At the suggestion of the defendant a new agreement dated January 13, 1912 [Saturday], was made, by which the plaintiffs let to the defendant the top half only of the said house "for the term of a weekly tenancy from the 13th day of January at the yearly rent of 24*l.* 14*s.* payable by equal weekly payments of 9*s.* 6*d.* in advance." During the war the defendant joined the army, and after his discharge the plaintiffs appointed him to the position of chief electrical engineer. In January, 1922, the defendant gave notice to the plaintiffs to terminate his employment with them. Subsequently, on Saturday, January 28, 1922, the foreman of the plaintiffs gave the defendant a week's verbal notice to quit the demised premises. On Monday, January 30, 1922, the plaintiffs wrote to the defendant stating that they confirmed that verbal notice to quit and deliver up possession of the premises which the defendant had been occupying because of his employment. On the same date the defendant wrote to the plaintiffs that he was not able to give up possession, that he was willing to continue to pay the rent, that it was impossible to find other accommodation, and that he was advised that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17) (1), would protect him from ejectment.

The defendant not having given up possession in accordance with their request, the plaintiffs served upon him a written notice to quit in the following terms: "Mr. H. W. Bignell. 34A Musard Road, 6th October, 1922 [Friday]. The Estate

(1) See s. 5, sub-s. 1 (d) and (i.).

Company hereby give you the requisite week's notice for the termination of your tenancy one week from Monday next, on or before which date they will require vacant possession."

On November 16, 1922, the plaintiffs brought the present action against the defendant in the county court claiming: (1.) possession of the demised premises on the ground that the tenancy had been determined by notice to quit; (2.) that the premises were let to the defendant in consequence of his employment by the plaintiffs, that that employment had ceased, and that the plaintiffs required possession for another whole-time employee.

On December 19, 1922, the case was tried in the county court. When it was opened the learned judge asked what the defence was and was told that the only question was the question of fact whether or not the premises were let by the plaintiffs to the defendant in consequence of his employment by them, and that the defence was that they were not so let. Evidence was given in support of the facts above stated. The chief clerk to the plaintiffs, Mr. W. F. Stevenson, further stated in evidence on their behalf that the premises were let to the defendant in consequence of his employment by them, and that the premises were required by the plaintiffs for the occupation of another employee who was then in their whole-time employment. The defendant stated in evidence that the premises were not let to him in consequence of his employment by the plaintiffs. Towards the end of the defendant's case the question of the validity of the notice to quit was raised by the defendant's solicitor for the first time, but was only shortly dealt with.

The learned judge in giving judgment stated (according to his note) that no point of law was taken, that the only question was whether the house was let in consequence of employment, that he found that it was let in consequence of employment and that the defendant had ceased to be in the employment of the plaintiffs before the action was commenced, and that the plaintiffs were entitled to possession; and he accordingly made an order that the defendant should give the plaintiffs possession on or before March 1, 1923.

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The course of the proceedings in the county court is further and more particularly described below in the earlier part of the judgment of Lush J.

The defendant gave notice of appeal that the order of the county court judge might be set aside or varied, and that in lieu thereof judgment might be entered for the defendant or a new trial had between the parties on the grounds: (1.) that the judge was wrong in law in holding that the plaintiffs came within any of the provisions of s. 5, sub-s. 1, of the Act of 1920; (2.) that the judge was wrong in holding that the plaintiffs were entitled to possession; (3.) that the order was against the weight of the evidence; (4.) that there was no evidence upon which the judge could find that the premises were let by the plaintiffs to the defendant in consequence of the defendant's employment by them.

H. Salter Nichols for the defendant.

F. C. Wynn Werninck for the plaintiffs.

[The questions raised in argument on the hearing of the appeal and the authorities cited appear from the judgments of their Lordships set out below.]

LUSH J. In this case, in which the plaintiffs, the landlords, sue the defendant, their tenant, for possession of the demised premises, the learned judge of the Brompton County Court has made an order for possession and the defendant has appealed.

Before discussing the case, I propose to say a word as to the circumstances in which this appeal has come before us. I do so for this reason: that, if the case should go to the Court of Appeal, that Court, on looking at the judge's note, might, without some explanation, feel the same surprise as we at first felt that the appeal should ever have been brought. According to his original note, which was only two lines in length, the learned judge stated that the only question was one of fact—namely: "was the house let in consequence of employment?" and he found that it was so let, and made an order for possession. When his note was bespoken

with a view to this appeal, he added to it a further statement which contained these words: "No point of law was taken. I was told by the solicitors who appeared for the plaintiff and the defendant that it was a question of fact only," and then went on to state that he decided that the dwelling house was let in consequence of employment and that the defendant had ceased to be in that employment before the action was commenced. If that note is accurate the question which the judge decided was one of fact only. The two solicitors who conducted the case in the county court have, however, made affidavits as to what took place, and they agree that the learned judge did decide a very important question of law, as to the validity of the notice to quit which had been served by the landlords upon the tenant, and they both agree that the learned judge held that the notice to quit was invalid. Having regard to these statements, we communicated with the learned judge and he informed us that there had been a misapprehension, and that he had held that the notice to quit was a valid notice, although he might have expressed some doubt as to its validity. That being so, the learned judge did decide the question of law as to the validity of the notice to quit. He decided that the notice to quit was valid, and there must have been some mistake in the minds of those who thought that he had decided otherwise. It is therefore now clear that there is a question of law for us to deal with—namely, was this notice to quit valid or invalid?

There is a second question of law also of importance —namely, whether there was any evidence to support the learned judge's finding of fact that the house was let to a tenant in consequence of employment. To say that this is a question of law is, of course, quite consistent with the statement in the judge's note that he treated the question whether the house was let in consequence of employment as a question of fact. I may observe that it was necessary that the judge should consider the question of fact. The defendant, the tenant, was, but had ceased to be, in the

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employment of the plaintiffs, the landlords, who stated that they required the house for another employee in their whole-time employment. Under the Increase of Rent, &c., Act of 1920, s. 5, sub-s. 1 (d) and (i.), if the defendant had not been in the employment of the plaintiffs, no order for possession could have been made against him unless alternative accommodation was available, but if he was in the employment of the plaintiffs, and the premises were let to him in consequence of that employment, then the plaintiffs were not bound to offer him alternative accommodation. It was, therefore, necessary that the learned judge should decide the question of fact whether or not the dwelling house was let to the defendant in consequence of his employment, and he found that it was so let. The second question of law before this Court is, as I have said, whether there was any evidence to support that finding of the judge.

The first question of law is whether the notice to quit was valid or invalid. The defendant was a weekly tenant and had been a weekly tenant for a very long time. The weekly tenancy began on a Saturday. On October 6, 1922, which was a Friday, the plaintiffs, the landlords, served upon the defendant a notice to quit which was expressed to be "the requisite week's notice for the termination of your tenancy one week from Monday next, ..." The notice to quit, therefore, did not expire at the end of a current week, that is to say upon a Saturday, but a week from the next Monday. The notice then adds: "on or before which date they will require vacant possession."

I may say that I very greatly doubt whether a notice to quit, assuming it to be free from objection in other respects, can be said to be valid in which the landlord mentions a specific date for the termination of the tenancy and adds that "on or before" that date they will require possession. A notice to quit must be certain and definite, and I am by no means sure that a notice to quit in that form is a certain and definite notice to quit on the day specified. It may be that it is a notice that the landlord will require possession before that day, and, if so, it seems obvious that it must be a bad notice

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to quit. That view is, no doubt, somewhat technical, and it may be that the more reasonable interpretation of the notice is to read it as meaning merely that if the tenant likes to give up possession before the day specified, the landlord is willing to take it; but I have great doubt whether it is right to put so favourable an interpretation as that upon this notice to quit. I am not going to rest my judgment upon these last words of the notice, but leave the question of their interpretation without expressing any definite opinion with regard to it, because in my view, apart altogether from these words, this notice to quit is invalid.

Having regard to the vast number of weekly tenancies that have been created in the past, one would have thought that the question must often have arisen what notice to quit is necessary to determine a tenancy of that kind, and it therefore seems a little strange that the law should be in a condition of uncertainty with regard to the necessary requisites of a notice to quit in the case of a weekly tenancy. In order to ascertain what these requisites are there are two points to be considered—namely: first, what length of notice to quit must a landlord or tenant give to determine a weekly tenancy; second, whether the notice to quit must expire at the end of the weekly term or may expire during the currency of that term?

With regard to the first point—namely, what ought the length of the notice to quit to be—several possible answers have been suggested. It has been said for instance that it should be a week's notice, or as was once said by a very learned judge, half a week's notice, or more than a week's notice, or a reasonable notice. Cases are to be found in the books, some of which lay down one of these propositions and some another. Several cases have decided that a reasonable notice is all that is necessary. I cannot bring myself to accept that view. A notice to quit which was expressed to be to quit at the end of a reasonable time would clearly not be a good notice because it would not be definite or certain. Again, if a landlord or tenant gave a notice to quit on such and such a date, no one would know whether it was a valid notice

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until some jury or other tribunal had found that it was in fact reasonable, because in the absence of such a finding even reasonable people might take different views as to whether it was in the circumstances a reasonable notice to quit. The tendency of modern decisions, however, has been to define a reasonable notice to quit as being a week's notice. That in my opinion is the proper view. I think that the law is that in the case of a weekly tenancy a week's notice to quit is that which should be given, and I do not propose to occupy further time in discussing the question of the proper duration of the notice. In the present case the notice to quit, exclusive of the last words with which I have already dealt, was a week's notice, and I think that, so far as its duration was concerned, it was sufficient.

The second point—namely, whether the notice to quit must expire at the end of a current week, or may be made to expire on any day the landlord or tenant chooses to fix—is of a more serious character. The conflict of the authorities on that question is a little surprising, and I will deal with them immediately. In the first place, however, I am going to express my view upon this question without regard to authority. With great respect to two of my learned brethren who have recently decided this question in a way which is contrary to my opinion, I think the true view is that in any periodic tenancy, whether it be yearly, quarterly, monthly, or weekly, the notice to quit must expire at the end of the current period. It has been clearly settled, as is admitted, that in the cases of a yearly tenancy and a quarterly tenancy the notice to quit must expire at the end of the current period, and that in either of those cases it would be bad if it were made to expire in the middle of that period. The question is whether the same rule applies to a weekly tenancy, and, I may add, to a monthly tenancy, for they both stand on the same footing as was held in *Simmons* v. *Crossley* (1) by Swift J., I think quite correctly, Acton J., the other member of the Court, expressing no opinion on that point. It seems to me to follow from the nature of a weekly tenancy—and the same

(1) [1922] 2 K. B. 95.

principle will apply in the case of any other periodic tenancy —that the notice to quit must expire at the end of a particular week. A weekly tenancy is a tenancy by the week, just as a quarterly tenancy is a tenancy by the quarter. If the week's notice to quit is not given so as to expire at the end of a particular week, but at some other time, then another week begins before the notice expires, and this must mean that another complete week has begun. The tenancy being by the week, I do not see how it is possible for either party to give a notice to quit to expire during the currency of a week. When a fresh week begins the tenancy continues for another week, just as, in the case of a quarterly tenancy, when a fresh quarter begins, the tenancy continues for another quarter. In the case of *Sandford* v. *Clarke* (1) Wills J., when sitting as a member of the Divisional Court, held, in the case of a weekly tenancy, that when a week expired the tenant could go out without having given any notice to quit. The learned judge recalled that judgment, however, and held that it was wrong in the later case of *Bowen* v. *Anderson*. (2) I an inclined to think that he held in the latter case that it is only at the end of a week that the tenant may go out, or may be ordered to go out, and not during the weekly period. However that may be, in my view, apart from authority, when a new week is entered upon it is for the complete week, and the tenant can only leave or the landlord turn him out when a complete week expires. On any other view I find the greatest difficulty in knowing what is to become of the rent. The rent is only due at the end of the week. Supposing that in a weekly tenancy which commenced on a Saturday the landlord or the tenant gives notice to quit on a Wednesday, is the tenant to pay rent from the Saturday to the Wednesday or not ? The rent would not be apportionable. In *Oldershaw* v. *Holt* (3) Coleridge J. expressly held, and I do not think that the other members of the Court differed from him, that the Apportionment Act then in force, 4 & 5 Will. 4, c. 22, s. 2, did not apply to a case between landlord and tenant, but

(1) (1888) 21 Q. B. D. 398. (2) [1894] 1 Q. B. 164.
(3) (1840) 12 Ad. & E. 590.

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only where the rent was to be divided as between tenant for life and remainderman. The Apportionment Act, 1870 (33 & 34 Vict. c. 35), is for this purpose substantially the same as the former Act. Before any Apportionment Act had been passed the difficulty would have arisen as to what would happen about the rent when notice to quit was given during the currency of a week or other period, and that was pointed out in the case to which I have just referred. I do not see what is to happen to the rent in the case of a weekly tenancy if the landlord or the tenant can determine the tenancy in the middle of a week. Apart from authority, my own view, therefore, is that all these periodic tenancies stand on the same footing, and that, in the case of a weekly tenancy, if either party wishes to give notice to quit he must take care that it is a notice which expires at the end of a week, unless of course the parties have agreed otherwise. If the party who desires to give notice is doubtful as to the day on which the period expires, he can make sure that the notice will be valid by adding the words that are given in the common form of notice to quit to the effect that if the date mentioned is not the real date on which the period expires, then the notice to quit is to expire on the proper day of expiry next after the expiration of the current period.

Having stated my view apart from authority, I will now consider the relevant authorities. As these appear at first sight to differ considerably from each other, one must endeavour to reconcile them, or to distinguish them, or, where they are clearly in conflict, to express one's own view as to whether a particular authority is right or wrong. In the case of *Simmons* v. *Crossley* (1), to which I have already referred, Swift J. dealt with this question in a long judgment in which he reviewed the previous authorities and came to a definite conclusion. The last passage in his judgment is as follows: "In this conflict of judicial opinion it seems to me that the view held by Wright J. (2) is the more correct. I think that to determine a monthly or weekly tenancy

(1) [1922] 2 K. B. 95, 107.
(2) In *Skelly* v. *Thompson* 45 Ir. L. T. 138, 139.

reasonable notice must be given, and that such notice, if in other respects reasonable, is not rendered unreasonable and invalid merely because it expires on some day other than the last day of a month or week calculated from the commencement of the tenancy." As I have already pointed out, Swift J. said that the proposition laid down by that case in regard to a monthly tenancy applied equally to a weekly tenancy, while Acton J. expressed no opinion on that point. Swift J. came to that conclusion because he was of opinion that it had been arrived at in two cases previously decided in the Irish Courts, and that he ought to follow these cases.

As this question is one of importance I will for a moment or two examine the two Irish cases in order to see whether they justify the conclusion come to by Swift J. The first of these is the case of *Harvey* v. *Copeland*. (1) The headnote to that case is as follows: "A weekly tenancy commencing on Thursday, held to be duly determined by written notice served on Thursday, 5th November, to quit and deliver up possession on or before Friday, the 13th November (Gibson J. dissenting):—*Held*, by O'Brien and Gibson JJ., that a week's notice, and by Johnson J., that a reasonable notice, is necessary and sufficient to determine a weekly tenancy. *Held*, by Gibson J., that the tenancy could only be determined by a notice expiring on a Thursday." One of the learned judges, therefore, went back to the old view on the question of the duration of the notice—as to which I have said all that I have to say—and held that a reasonable notice was sufficient. As to the question with which we are now dealing—namely, the date of expiration of the notice—Gibson J. took the view, which, as I have said, is in my opinion the right view, that the tenancy can only be determined by a notice expiring at the end of the term. I need not read the learned judge's judgment. As to the other two learned judges, I desire to say that I am not sure that they took the view which Swift J. thought they took.. It will be observed that in that case the notice to quit was for Friday, one day after Thursday on

(1) (1892) 30 L. R. Ir. 412, 419, 422.

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which the period expired. Johnson J. referred to certain authorities, including *Jones* v. *Mills* (1), which I will mention again presently, and concluded by saying this: "In my opinion the notice was a reasonable one to put an end to his weekly tenancy, and is not vitiated by offering him an additional day if he so desired, free of rent, to clear out." Johnson J., therefore, gave effect to his view that a reasonable notice is sufficient notice. If that view be wrong—and I have already said I think there are cases in the Courts of this country which establish now that a week's notice is the proper notice—I do not see that the learned judge's judgment can be taken as an authority in support of the proposition that when a week's notice is necessary it may be made to expire on any given date. The foundation of the learned judge's judgment was that it was not necessary to make the notice expire on a given day because a reasonable notice was all that need be given. O'Brien J. in his judgment deals with this question of sufficient notice, and he says: "I am therefore of opinion that it ought to be now laid down that a week's notice to quit is necessary to determine a weekly tenancy. But, further, in this case, in my opinion, the notice was not only sufficient, but it was more than sufficient. The tenant entered on a Thursday, and he is required to leave on or before the following Friday. He is entitled in law to hold during the whole of the Thursday up to the last minute, and here the notice is to quit on the next day or before it. The theory of a tacit renovation of the contract cannot arise, for, on the landlord delivering this notice to quit, his right to further rent was at an end, nor was the tenant any way liable after the 13th, and there could be no new contract. The contract of tenancy was entire, and the landlord had himself dissolved it by his own act before it was complete, and could not recover for any part of the next week." In my view that case does not support the judgment of Swift J. The other case relied upon by Swift J. is *Skelly* v. *Thompson* (2), the headnote to which is as follows: "A week's notice to quit, expiring on any day, is sufficient to

(1) 10 C. B. (N. S.) 788. (2) 45 Ir. L. T. 138.

determine a weekly tenancy." The learned judge who decided that case, Wright J., gave a short judgment. He said: "*Harvey* v. *Copeland* (1) is a direct authority for the proposition that reasonable notice is sufficient to terminate a weekly tenancy." Before reading what follows I desire with respect to interpose this statement, that I cannot see that *Harvey* v. *Copeland* (1) established that proposition. I have read the judgments of the three learned judges who decided that case, and it appears to me that although they took views which were to a great extent different, they in effect established that a week's notice is the proper notice to give. Wright J. goes on: "A week's notice has always been held reasonable and sufficient, and the question I have now to decide is whether or not it must determine upon the gale day of the tenancy. I hold that the notice if it is sufficient in other respects, may be given for any day of the week, and, accordingly, I affirm the decree for possession." Although the learned judge expressed that view I think he did so not as having come to it independently, but rather on the authority of *Harvey* v. *Copeland* (1), and it would be wrong to say that that case so decided. These are the authorities on which Swift and Acton JJ. held that in the case of a monthly tenancy the notice to quit need not expire at the end of the period, and on which Swift J. further held that the same rule applies in the case of a weekly tenancy. To my mind these authorities do not support the conclusions arrived at by these learned judges.

There are certain decisions in the English Courts which seem to imply that in the case of a weekly tenancy the notice to quit must be a notice expiring at the end of a week. In the recent case of *Mellows* v. *Lowe* (2) McCardie J. said: "The first question is, what is the position of a weekly tenant? It is vital to remember that the letting to a weekly tenant is not a letting which expires at the end of the first week or at the end of each succeeding week; in the ordinary course, as in the present case, it is a letting for a period of time which is determinable by due notice, generally regarded as a week's

(1) 30 L. R. Ir. 412. (2) [1923] 1 K. B. 522, 524.

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notice. In *Gandy* v. *Jubber* (1) the Court of Exchequer Chamber pointed out that in the case of a tenancy from year to year there is not a reletting at the commencement of every year but there is a springing interest which arises and which is only determined by a proper notice to quit. *Bowen* v. *Anderson* (2) applied the same principle to a weekly tenancy, the headnote to that case correctly stating that 'a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy.'" In *Jones* v. *Mills* (3) Erle C.J. said: "I also think that the tenant, having held for several years, was not liable to be turned out at the end of any week, without notice. I cannot find any authority for saying that his tenancy was determined at the end of each week. The rule which applies to tenancies from year to year has never, it seems, been extended to the case of a weekly or monthly tenant; but, though it has been laid down that a weekly or a monthly holding does not require a week's or a month's notice to determine it, unless there be some special agreement or some custom, I do not find that any person has ever held that the interest of a tenant so holding may be put an end to without any notice at all. It would be most unreasonable if a landlord was held to be entitled to turn his weekly tenant out at twelve o'clock at night on the last day of the week. Some notice must be necessary. . . . . " (4) Williams J. said: "It cannot be said that there was a new contract each week: it must have been a tenancy from week to week for so long as the parties should respectively please. If it had been a tenancy from year to year, it would have undoubtedly subsisted until it was terminated by a proper notice. The question is whether there is in this respect any difference in principle between a tenancy from week to week and a tenancy from year to year. I apprehend that in either case there must be a legal expression of intention that the tenancy should cease." I think the true conclusion to draw from that case is, that in order to determine a weekly tenancy

(1) (1865) 9 B. & S. 15.
(2) [1894] 1 Q. B. 164.
(3) 10 C. B. (N. S.) 788.
(4) Ibid. 796.

a notice to quit must be given and it must be given to expire at the end of the week, in other words that the tenancy does not come to an end of itself, but that it will come to an end if a notice to quit be given to expire at the end of a periodic week of the tenancy. In *Mayhew* v. *Suttle* (1), where an agreement was entered into between the plaintiff and the defendant which provided (inter alia) that the plaintiff should enter upon premises belonging to the defendant and carry on therein for the defendant the trade of selling beer, and that when either party should be desirous of determining the agreement he should be entitled to do so on giving a month's notice as therein mentioned, it was held by the Court of Exchequer Chamber that the plaintiff occupied not as tenant, but as servant to the defendant, and could not maintain trespass against the defendant for entering the premises without having given a month's notice. In delivering the judgment of the Court Wightman J. said: "This provision seems well applicable to, and at all events not inconsistent with, the relation of these parties being that of employer and employed. The giving up the occupation is treated as ancillary to and connected with the putting an end to the plaintiff's carrying on and conducting the trade. The notice may be given at any time, and not at the end of each month from the commencement. . . . . " (2) That statement must be understood as meaning that if in that case there had in fact been a monthly tenancy, then, as the learned judge said, the notice to quit would have expired at the end of some complete month, and it was because the agreement did not provide for the ordinary incident of a monthly tenancy that the Court held, among other things, that there was not in reality any monthly tenancy. The judgment appears to me to support the view which I have stated that it is an ordinary and necessary incident of a monthly or other periodical tenancy that it should be determinable by a notice to quit expiring at the end of the month or other period of the tenancy.

For these reasons I think that the notice to quit which

(1) (1854) 4 E. & B. 347.

(2) 4 E. & B. 356.

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was given in the present case is bad. It was not a notice to quit which was to expire at the end of a week. The rule that a notice to quit is bad which does not comply with the condition prescribed by law that it must expire at the proper time, may seem to be somewhat technical to persons who are not acquainted with the law relating to these matters, but one cannot on that account depart from the rule and abstain from applying it. I am therefore of opinion that the judgment of the learned county court judge was wrong and that this appeal should be allowed.

The other question of law is whether there was any evidence to support the finding of the learned judge that the premises were let to the defendant, who was in the employment of the plaintiffs, in such circumstances as would justify the view that they had been "let to him in consequence of that employment" within the meaning of s. 5, sub-s. 1 (i.), of the Act of 1920, and that an order for possession could therefore be made although alternative accommodation was not available. What do these words of the Act mean? In my view they mean, not that the landlord only knows, but that both the landlord and the tenant know, that the premises were let to the tenant in consequence of his employment. [His Lordship considered the evidence at length and continued:] There was here no evidence to show that the defendant as well as the plaintiffs knew or believed that the premises were let to him in consequence of his employment. The learned judge was therefore also wrong in holding that the premises were let to the defendant in consequence of his employment, and that an order could be made against him in the absence of alternative accommodation.

In my opinion this appeal should be allowed.

SALTER J. As regards the question of the validity of the notice to quit, I am of the same opinion as my Lord, but in view of the general importance of the point raised, I will state my reasons. It was admitted on behalf of the plaintiffs that the defendant was entitled to a notice to quit, and the question is whether or not the notice which

was given is good in law. The tenancy was created by an agreement in writing made upon and dated January 13, 1912, in these terms: "The landlords hereby let and the tenant hereby takes all that messuage . . . . for the term of a weekly tenancy from the 13th day of January, at the yearly rent of £24-14-0 payable by equal weekly payments of 9*s.* 6*d.* in advance, the first payment to be made on signing this agreement." The day on which the tenancy began, January 13, 1912, was a Saturday, and the tenancy is a tenancy from week to week, from Saturday to Saturday. The weekly rent of 9*s.* 6*d.* is payable every Saturday in advance in respect of the ensuing week until the following Saturday. The words "at the yearly rent of £24-14-0" are a mere computation. The tenancy is from Saturday to Saturday. The notice to quit was in writing and was dated October 6, 1922, that day being a Friday. It was in these terms: "The Estate Company hereby give you the requisite week's notice for the termination of your tenancy one week from Monday next, on or before which date they will require vacant possession." The first question is the meaning of these words. If they mean that the relation of landlord and tenant is to cease on Saturday, October 14, but that the defendant may, if he pleases, have licence to occupy on the Sunday and Monday without rent or other tenant's liability, then I think the notice to quit was good. But in my opinion the words cannot be so read. Assuming that the notice is not bad for ambiguity, it is a notice by which the landlord claims to maintain the relation of landlord and tenant until Monday, October 16, and to determine it on that day. It is a notice which, rightly or wrongly, purports as of right to determine the tenancy on the second of the seven days forming a current week of the tenancy.

In this case it was not suggested that the notice to quit was either too long or too short. No question as to the length of the notice arises, and I shall therefore say nothing about that.

As regards the term of the tenancy with which we are

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dealing, the parties by the agreement between them have expressed the intention that the tenancy shall be a periodic tenancy—namely, a tenancy from week to week—and beyond this no further or other intention can be gathered either from the words or the conduct of the parties. In the case of all periodic tenancies, whether from year to year, or from quarter to quarter, or from month to month, or for any other period, the law, as I find it stated in the authorities, appears to be that the tenancy is from period to period, from one fixed date to another. It is a tenancy for so many years, or quarters, or months, or weeks, as the parties may think fit. If a new period be allowed to begin, the tenancy must, in the absence of course of any other arrangement between the parties, continue until the period ends, and neither party can, against the will of the other, put an end to the tenancy during the currency of the period. The characteristics of the periodic tenancy from year to year were laid down in the Court of Exchequer Chamber in *Gandy* v. *Jubber* (1) as follows: "There frequently is an actual demise from year to year so long as both parties please. The nature of this tenancy is discussed in 4 Bac. Abr. tit. *Leases and Terms for Years*, pp. 838, 839, 7th ed., and this article has always been deemed of the highest authority being said to be the work of Chief Baron Gilbert. It seems clear that the learned author considered that the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the years past and also for the year so entered on, and that it is not a reletting at the commencement of the third and subsequent years. We think this is the true nature of a tenancy from year to year created by express words, and that there is not in contemplation of law a recommencing or reletting at the

(1) 9 B. & S. 15, 18.

beginning of each year." The Court is there stating the characteristics of a tenancy from year to year. In my opinion those are the characteristics of every periodic tenancy. I am at a loss to understand how any distinction can be made as regards these characteristics between one periodic tenancy and another. It appears to me to be of the essence of every periodic tenancy that it can only be broken in invitum at the end of a period of the tenancy. In *Kemp* v. *Derrett* (1) the principle was held to apply in the case of a quarterly tenancy. The case of *Jones* v. *Mills* (2) is to my mind conclusive upon the present point. It was an action of ejectment in respect of a weekly tenancy, and no notice to quit had been given. The landlord relied upon an alleged disclaimer of his title by the tenant, which would have entitled him to eject without notice to quit. The Court held that there had been no disclaimer, and therefore the question arose whether the tenant was entitled to notice to quit. The Court decided that he was entitled to notice to quit, and also discussed the length of notice necessary to determine a weekly tenancy. The judgments of Erle C.J. and Williams J. seem to me to show clearly that, while discussing whether notice to quit is necessary to determine a weekly tenancy, and what length of notice is sufficient for that purpose, both these learned judges assumed that, if notice to quit was necessary, and whatever the proper length of notice might be, the notice must end with a week of the tenancy. Willes J., whose judgment follows, said (3): "Upon the question of disclaimer, I have nothing to add. As to the other point, I can quite understand that the law may be as laid down by my Lord and my brother Williams; and, as they think so, and my brother Byles also, I believe, I have no doubt that the inference of law arising from a contract of tenancy like this, is, that it should continue from week to week until put an end to by the one party or the other expressing his dissent to its continuance, and that such dissent cannot be so

(1) (1814) 3 Camp. 510. (2) 10 C. B. (N. S.) 788.
(3) 10 C. B. (N. S.) 799.

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expressed as to put an end to the tenancy before the end of the current week. I am ready to adopt that view; but, to say as matter of law, that a week's notice is necessary, is a proposition which I am not prepared to assent to." Willes J. therefore laid it down as law, and as the opinion which he understood had just been expressed by Erle C.J. and Williams J., that a weekly tenancy cannot be determined by notice except at the end of a week of the tenancy. Neither of the learned judges dissented from the view thus attributed to them, nor did Byles J., whose judgment follows. This case seems to me a clear and long standing decision of a Court of great authority that a tenancy from week to week can only be determined by notice to quit where such notice expires at the end of a week of the tenancy. In the earlier case of *Doe* v. *Bayley* (1) the Court declined to give effect to a notice to determine a weekly tenancy on a certain day of the week in the absence of evidence that the weekly term expired on that day. These appear to me to be conclusive authorities in favour of the view which I have expressed.

It is said that there is authority for another view, and several cases have been relied upon in support of that contention. One of these is the case of *Harvey* v. *Copeland*. (2) One of the three learned judges in that case, Gibson J., expressed a view which I respectfully think is the right view. As to the other two judges, Johnson and O'Brien JJ., it seems to me that not only did they not hold that a notice to determine a weekly tenancy can be good if it expires during the currency of a weekly period, but on the contrary they assumed that it should expire at the end of a period, and they read the notice to quit which was given in that particular case in a way which enabled them to reconcile it with the rule. There is one authority, undoubtedly, which is opposed to this view, the case of *Skelly* v. *Thompson*. (3) In that case Wright J. said that *Harvey* v. *Copeland* (4) was a direct authority for the proposition that a reasonable notice was sufficient to terminate a weekly tenancy. That is no doubt true.

(1) (1831) 5 Car & P. 67.
(2) 30 L. R. Ir. 412.
(3) 45 Ir. L. T. 138.
(4) 30 L. R. Ir. 412.

A week's notice has always been held to be reasonable and sufficient. The learned judge went on to hold that the notice, if sufficient in other respects, might be given for any day of the week. He did not purport to base his judgment on *Harvey* v. *Copeland* (1); it is his own decision, and, with great respect, I am unable to agree with it. All the text-books, so far as I can find, treat it as clear and settled law that, in all periodic tenancies, the tenancy can only be broken by a notice to quit when it expires at the end of the period. My Lord has referred to the recent decision of the Divisional Court in *Simmons* v. *Crossley* (2) which dealt with a monthly tenancy. It is not strictly speaking necessary for us to differ from that case, but it would not be right not to say that I cannot agree with the decision in so far as it laid down that a notice to determine a monthly tenancy can be good, if it is made to expire during the currency of the month.

For these reasons I think that the notice to quit in this case was bad, and therefore that the judgment under appeal was wrong.

The other question which has been raised in this case is whether there was any evidence on which the county court judge could find that the premises were let to the tenant in consequence of his employment. It is not necessary that we should decide that question, but I may say that I think there was evidence on which the learned judge could so find.

In my opinion this appeal should be allowed.

Appeal allowed. Judgment for defendant.

Solicitor for appellant: *Richard J. Davis.*

Solicitors for respondents: *Pierron & Morley.*

(1) 30 L. R. Ir. 412. (2) [1922] 2 K. B. 95.

J. R.

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Oct. 25.

[IN THE COURT OF APPEAL.]

ANDERSON, LIMITED *v.* DANIEL.

Agricultural Fertiliser—Sale of—Omission to give Invoice showing Percentages of Chemical Ingredients—Reasonable Excuse—Legality of Sale—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-s.* 1; *s.* 6, *sub-s.* 1 (*a*).

By s. 1, sub-s. 1, of the Fertilisers and Feeding Stuffs Act, 1906: "Every person who sells for use as a fertiliser of the soil any article which has been subjected to any artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating . . . . what are the respective percentages (if any)" of certain chemical substances contained in the article.

By s. 6, sub-s. 1: "If any person who sells any article for use as a fertiliser of the soil . . . . (*a*) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act; . . . . he shall, without prejudice to any civil liability, be liable on summary conviction" to a penalty:—

Held, that, as the object of the statute in requiring the vendor to give the statutory invoice and imposing on him a penalty in the event of his default is to protect the purchasers of fertilisers, the effect of non-compliance with the requirement is not merely to render the vendor liable to the penalty, but also to make the sale illegal and preclude the vendor from suing for the price.

The fact that, owing to the nature of the article sold as a fertiliser, an analysis of it would necessitate so expensive a process as to make it impossible to sell it after analysis at a profit, affords no "reasonable excuse" within the meaning of s. 6, sub-s. 1, for omitting to give the invoice required by the Act.

Semble that neither will impossibility of analysis afford any excuse, the intention of the statute in that event being to prohibit the sale of the article altogether.

The expression "without prejudice to any civil liability" in s. 6, sub-s. 1, refers to the civil liability of the vendor, not to that of the purchaser.

Appeal from a Divisional Court (Lush and Salter JJ.).

The action was commenced in the county court of Yorkshire holden at New Malton, and was brought to recover 77*l.*, the price of ten tons of a stuff called "salvage." "Salvage" consists of the sweepings of the holds of ships which have brought from abroad cargoes of nitrate of soda, sulphate of ammonia, potash, superphosphates, or basic slag. In the process of unloading such ships many bags and casks

burst, and portions of the contents fall into the hold. From time to time the holds are cleaned out and the sweepings are sold for manure. There was evidence that the manure manufacturers in Hull had dealt in this stuff for years, selling it as "salvage," and it was well known by purchasers that that designation meant that the article consisted of the sweepings of holds.

By s. 1, sub-s. 1, of the Fertilisers and Feeding Stuffs Act, 1906: "Every person who sells for use as a fertiliser of the soil any article which has been subjected to an artificial process in the United Kingdom, or which has been imported from abroad, shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article, and the invoice shall have effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

By s. 6, sub-s. 1: "If any person who sells any article for use as a fertiliser of the soil . . . . commits any of the following offences, namely: (*a*) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act; . . . . he shall, without prejudice to any civil liability, be liable on summary conviction" to a penalty.

It is the custom of the trade to sell "salvage" without analysis, and therefore without giving such an invoice as is required by s. 1, the reason being that it is commercially impracticable to give it. Owing to the fact that the sweepings from the hold of one ship might be nitrate of soda, those from the hold of another might be basic slag, and so on, the collection of the sweepings of various ships would require so much mixing before a fair sample could be obtained for the purposes of analysis, and the cost of obtaining such an analysis would be so great, that the stuff when analysed could only be sold profitably at a price which no purchaser would give; but salvage is always sold at a price much below that of "standard" or properly invoiced manures. The

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plaintiffs, in accordance with the above custom, sold the salvage in question without giving to the purchaser any invoice showing the percentages of the chemical ingredients. The defendant contended that owing to the absence of the invoice the sale was illegal, and that the plaintiffs could not recover the price. The county court judge in view of the fact that it was commercially impracticable to give such an invoice held that the plaintiffs had a "reasonable excuse" for not giving it within the meaning of s. 6, sub-s. 1; that the sale was consequently not illegal; and that the plaintiffs were entitled to recover. He accordingly gave judgment for the plaintiffs for the amount claimed. On appeal to the Divisional Court the Court were divided, Lush J. being for affirming the judgment of the county court, and Salter J. for reversing it.

The defendant appealed to the Court of Appeal.

Paley Scott for the appellant. The omission to give the required invoice made the contract illegal and void so that it could not be sued upon. For the purpose of considering the legality of the contract s. 1 of the Act must be read by itself and without reference to s. 6; its language is unqualified. The latter section deals only with the punishment of the vendor, it does not, even where there was a reasonable excuse for not giving the invoice, enable the contract to be put in suit. "It may be taken as a received rule of law, that what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject matter of an action": per Lord Ellenborough C.J. in *Langton* v. *Hughes*. (1) Thus in *Bensley* v. *Bignold* (2), where a printer had printed a pamphlet for the defendant but had neglected to affix his name to it as required by the Act of 39 Geo. 3, c. 79, it was held that he could not recover for the labour and materials used in doing the work. So where the plaintiff sold butter firkins without marking on them the exact weight or tare of the vessels in accordance with 36 Geo. 3, c. 86: *Forster* v. *Taylor* (3);

(1) (1813) 1 M. & S. 593, 596. (2) (1822) 5 B. & Al. 335.
(3) (1834) 5 B. & Ad. 887.

or sold and delivered coals without giving a ticket bearing the name of the coals and signed by the meter as required by 47 Geo. 3, c. 68 : *Little* v. *Poole* (1) ; or bricks not of the statutory dimensions according to 17 Geo. 3, c. 42 : *Law* v. *Hodson* (2) ; or linseed oil without a statutory licence : *In re Mahmoud and Ispahani* (3) ; in all those cases he was held not entitled to recover the price of the goods sold. But even if s. 1 is to be read along with s. 6, sub-s. 1, that will not assist the plaintiffs, for they had no " reasonable excuse " within the meaning of the latter section. That section does not contemplate a reasonable excuse for not giving any invoice at all, but only for not giving it as soon as possible after delivery, or in other words for delay, which is not the case here. But, even if it contemplates a reasonable excuse for not giving an invoice at all, here there was no evidence on which the county court judge could find that the excuse set up was reasonable. It is not enough that the giving of the invoice would make the contract unprofitable.

Macaskie for the respondents. The omission to send a certificate of the constituents of a " fertiliser " does not render the contract of sale bad so as to disentitle the seller to sue for the price. The cases cited on the other side are all distinguishable, for in all of them the requirement of the particular statute had to be satisfied before or simultaneously with the performance of the contract, whereas under this Act it is sufficient if the invoice is given after the delivery of the goods. It cannot be that a contract, which was perfectly valid when made and also when performed, will become illegal by relation by the neglect to do an act which is not required to be done till after performance. Sect. 1 is to be read along with s. 6, and the statute contemplates that where a reasonable excuse exists for not doing the act the penalty will not attach, and the vendor will not come within the prohibition. That that is so is shown by the introduction of the words " without prejudice to any civil liability." Those words are perfectly general, and will include the liability of the purchaser to pay

(1) (1829) 9 B. & C. 192. (2) (1809) 11 East, 300.
(3) [1921] 2 K. B. 716.

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the price. The intention was to impose a penalty on the vendor for non-compliance with the statute, leaving the civil position of the parties exactly as it would have been if the statute had not been passed. No doubt a distinction is drawn in the authorities between statutes which impose penalties for the protection of revenue and those which impose them for the protection of a class of persons, and it is only under the latter statutes that non-compliance with the statutory requirement in connection with a contract will render the contract void; but here the defendant cannot say that he belongs to the class whom it was intended to protect, for he knew as well as the vendors what the origin of the "salvage" was, and that therefore the giving of an invoice was practically impossible. There is nothing in the language of s. 6, sub-s. 1, to show that the excuse contemplated is confined to cases of delay and does not extend to cases where no certificate is given at all. Then if the existence of a reasonable excuse affords an answer to the defence the county court judge has found as a fact that it existed here, and he is the judge of fact. There was sufficient evidence upon which he could so find, for if the impossibility of analysis is not sufficient to justify such a finding, the only alternative will be that "salvage," which is obviously of considerable value, could not be sold at all, but would have to be destroyed, a result which the Legislature cannot have intended.

Paley Scott was not called upon to reply.

BANKES L.J. This appeal raises an important question under the Fertilisers and Feeding Stuffs Act, 1906. The parties are the vendors and purchaser of some stuff which is known to the artificial manure trade in Hull as "salvage," and consists of the sweepings of the holds of vessels that have carried cargoes of nitrate of soda, sulphate of ammonia, potash, superphosphates, or basic slag. These sweepings, whatever they may in fact consist of, are sold under the name of "salvage" for manure. In this case the sale was of ten tons at 7*l.* 10*s.* a ton. The stuff was delivered, and

upon the vendors suing in the county court to recover the price the purchaser took the point that the contract was illegal, or at any rate that he was under no obligation to pay for the stuff. Whether he was right in that contention depends upon the construction to be put on two sections of the statute: s. 1, sub-s. 1, and s. 6, sub-s. 1. The former section provides that "Every person who sells for use as a fertiliser of the soil any article . . . . which has been imported from abroad, shall give to the purchaser an invoice stating the name of the article and what are the respective percentages, if any, of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article." That section is imperative in its requirement that the statutory invoice shall be given, but it does not specify the time at which it is to be given. That is provided by s. 6, sub-s. 1 (*a*): "If any person who sells any article for use as a fertiliser of the soil . . . . (*a*) fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act," he shall be liable to a penalty. The statute does not require the invoice to be given at the time of the sale, for in the majority of cases that would be impossible from a commercial point of view, but only on or before or as soon as possible after delivery. What then is the effect upon the contract of a failure to comply with that condition? It is said that this is one of those statutes which do not by imposing a penalty render the contract illegal in the event of a breach of the statutory provisions, but mean the enforcement of the penalty to be the only remedy for the breach. Upon that point I should like to refer to what Lord Wrenbury, then Buckley J., said in one of the money-lender cases: *Victorian Daylesford Syndicate* v. *Dott* (1): "The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose

(1) [1905] 2 Ch. 624, 629.

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statutes may be grouped under two heads, those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented on in numerous cases, including those which have been cited of *Cope* v. *Rowlands* (1) and *Fergusson* v. *Norman*. (2) Parke B. in the former case says the question to determine is whether the Act is 'meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether *one* of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers?' If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal." In my opinion that language applies directly to this case. Here the penalty is imposed wholly for the protection of the public, and the purchaser is entitled to take the objection that as the vendors have failed to give the required invoice the contract of sale is illegal and they cannot sue for the price.

But Mr. Macaskie has contended that a contract cannot be avoided for illegality except where it was illegal ab initio; and although no doubt a contract for the sale of a fertiliser, which expressly stipulated that no invoice of the statutory kind should be given or required, would be illegal ab initio, it is otherwise where, as here, the contract is silent on the subject of the invoice. It was said that in such a case the contract is perfectly legal when made, and cannot be avoided by a subsequent omission to do some act which the statute requires to be done. I do not think it is necessary to show that the contract was illegal ab initio in order to avoid it, it is enough to show that the vendors failed to perform it in the only way in which the statute allows it to be performed. In reference to that matter I will refer to two authorities. One is *Little* v. *Poole* (3), which was very like the present

(1) (1836) 2 M. & W. 149. (2) (1838) 5 Bing. N. C. 76.
(3) 9 B. & C. 192, 202, 203.

case in that by the section there relied upon as affording a defence to an action for the price of the coals supplied, it was provided that the delivery of the coal should be accompanied by a ticket stating the name of the coal sent and signed by the meter. In that case Bayley J. said: "The object of the Legislature will be best effected, therefore, by holding that the seller shall not recover the value of his coals where he does not cause to be delivered to the purchaser a ticket signed by the meter, pursuant to the provisions of the Act of Parliament." He there clearly indicates that where a person fails to perform the contract in the only way in which the statute says it may be performed, he is in exactly the same position as if the contract had been illegal and void ab initio. And Parke J. said: "The provision which requires that the meter shall be a party to the vendor's ticket, which is to contain a description of the quality of the coals, is a regulation intended to protect the purchaser; and, that being so, according to *Law* v. *Hodson* (1), the plaintiff cannot recover." The other authority to which I wish to refer is *Bonnard* v. *Dott* (2), where it was held that a moneylender who had not registered himself as such under the Moneylenders Act, 1900, which prohibits unregistered persons from making any money-lending agreement, though compellable to surrender any securities given to him by a borrower, could not recover back the amount that he had advanced. Collins M.R. said: "Any person who is in fact a moneylender must comply with the terms of the Act as to registration in order to take advantage of any contract." So here I say that a vendor of fertilisers must comply with the provisions as to invoice in order to take advantage of the contract of sale. From that point of view it is unnecessary to consider whether the contract was illegal ab initio.

The last point taken for the respondents, the point on which the county court judge decided the case, was that under the circumstances the vendors had a reasonable excuse for failing to give the invoice, and that consequently there was no offence in their failure to do so. I cannot accept

(1) 11 East, 300. (2) [1906] 1 Ch. 740, 746.

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that view. It seems to me quite plain that the prohibitive expense or the physical impossibility of analysis of the fertiliser sold is no excuse for the absence of an invoice. The statute is directed to the sale of articles of which the analysis was impossible, just as much as, or possibly more than, to the sale of those which are difficult of analysis or which are commercially unprofitable to analyse. Here all that was said was that in order to get a fair sample of the bulk of this "salvage" it would be necessary to mix the contents of the different bags so often that it would be commercially unprofitable to go to the expense of analysing it, because it could not, after analysis, be sold at a profit. The particular "salvage" sold may, for all that the purchaser knows, consist wholly of one of the ingredients, or a certain proportion of all five; he has no means of knowing whether it is of any value for the particular purpose for which he wants it. In my opinion there was no evidence upon which the county court judge could properly come to the conclusion that there was any reasonable excuse within s. 6, sub-s. 1 (*a*), for the vendors' failure to deliver an invoice, and under those circumstances they are not entitled to recover the price of the article sold. The appeal must be allowed.

SCRUTTON L.J. That this is a case of some little difficulty is obvious from the fact that the two learned judges in the Court below differed. It arises in this way: there is an Act of Parliament which requires that those who sell fertilisers imported from abroad shall give to the purchaser an invoice stating, within certain limits of error prescribed by the Board of Agriculture, the respective percentages of certain ingredients contained in the article they are selling. In this case the plaintiffs sold an article for use as a fertiliser of the soil without giving the required invoice; and when they sued for payment they were met by the defence that they had committed a breach of the statute, and that consequently the contract was illegal and the price could not be recovered. In the Court below one judge thought the defence was good, the

other thought it was not. There have been a large number of cases decided on various statutes dealing with the circumstances in which a breach of a statutory provision renders illegal, or incapable of suit, a contract to which it applies; but the general result of them is, I think, fairly clear. When the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties. A case which affords a forcible illustration of that principle is *Little* v. *Poole* (1), where a statute provided that a vendor of coal should at the time of the delivery of it deliver also a signed certificate as to the quality of the coal, and the vendor, who had neglected to deliver the certificate, was held disentitled to recover the price. There Bayley J., referring to *Law* v. *Hodson* (2), where a vendor of bricks, which were not of the dimensions of which they were required to be by a certain Act of Parliament, was held unable to recover their value, and applying it to the case before him, said: "But the Court held, that the policy of the Act being to protect the buyer against the fraud of the seller, would be best effected by holding, that the vendor should not recover the value of the bricks sold under such circumstances"; and Littledale J. said substantially the same thing. Now here the provision as to the invoice is clearly to protect a particular class of the public—namely, the people who buy artificial manures. The seller is required to give on or before or as soon as possible after delivery of the article an invoice stating the percentages of its ingredients. The vendors did not do so. It follows from the principle that I have stated that when they come to sue for the price they can be met with the defence that the way in which they performed the contract was illegal. Mr. Macaskie by way of answer took three points. He said, first, that that conclusion may be sound where the statutory

(1) 9 B. & C. 192, 201. (2) 11 East, 300.

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provision that is broken relates to something to be done at or before the delivery, but has no application where it relates to something to be done after delivery; he said that you cannot treat the contract as becoming illegal when it was not only legal at the time when it was made, but also at the time when the article was delivered under it; you cannot say the contract is illegal because of an omission after delivery, and therefore after the contract has been performed. The answer is that the giving of the invoice is part of the performance of the contract. It seems to me that where a statute requires the giving of an invoice within a reasonable time after the delivery of the goods exactly the same principle is to be applied as would be applicable if the statute required the invoice to be given at or before delivery, and a vendor on suing for the price could be met with the answer: "You have performed the contract in an illegal way." Secondly, Mr. Macaskie contended that, even if that was true of other statutes, in this statute there is an exceptional provision that the imposition of the penalty is to be "without prejudice to any civil liability," that is to say without prejudice to the civil liability of the purchaser to pay the price. But I read those words "without prejudice to any civil liability" as referring to the civil liability of the person who has broken the contract, in other words that the imposition of a penalty does not relieve the vendor from any obligation that he may be under to pay damages. Thirdly, Mr. Macaskie said that the requirement to deliver an invoice is not absolute, but only a requirement to deliver an invoice if the seller has no reasonable excuse for not doing so, and that the county court judge, who is the judge of fact, has found that under the circumstances the vendors had a reasonable excuse. But there must have been evidence on which the judge could properly so find, and here I am of opinion there was no such evidence. All that it amounts to is this: the article sold consisted of the sweepings of several different cargoes, and consequently a single sample taken from the bulk would not have fairly represented what the stuff was. It may have been taken from a cargo which consisted only of basic slag,

or it may have been taken from a ship which had carried one of the more expensive chemicals. The greater the number of the ingredients of which the "salvage" consists the more thorough must the mixing be, and the greater must be the number of the samples taken, if the samples are to represent a fair average, and all this involves expense. But in my view it is no reasonable excuse for the vendors not complying with the provisions of the statute that the expense would be prohibitive if they did. Holding therefore that there was no evidence on which the county court judge could come to the conclusion that there was reasonable excuse, we are left with the position that the vendors have committed an illegality in the performance of their contract, and that as the statutory provision was enacted for the protection of a class, including the purchaser who is now being sued, the vendors cannot recover the price. I agree that the appeal must be allowed.

ATKIN L.J. This case raises an interesting point which is capable of being reasonably argued both ways, as is evident from the conflicting judgments in the Court below. But after hearing the case argued I prefer the judgment of Salter J. The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner. If a man contracts to supply bricks, which when delivered are found not to be of the statutory dimensions, or a printer employed to print a book delivers it without his name being affixed to it as required by the statute in that behalf, the party so supplying the bricks or printing the book is not entitled to any remuneration

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for his services, which are ex hypothesi illegal and ought not to have been rendered in the form in which they were rendered. That is, I think, the principle which has been laid down in the cases. There is a later coal case, *Cundell* v. *Dawson* (1), in which the decision of the King's Bench in *Little* v. *Poole* (2), that a neglect by the seller of coals to deliver along with the coals a ticket signed as required by the statute was a bar to an action for the price, was followed by the Court of Common Pleas. There Wilde C.J., delivering the judgment of the Court, said (3): "It is obvious, from the contents of the statute, that its provisions are directed to the purpose before mentioned—viz., to secure the purchasers of coals from fraud in respect of quantity and quality of the coals; and that the delivery of the ticket is required as a part of the means for the attainment of that object: and that such was the object of the statute, was determined in the case of *Little* v. *Poole*. (2)" Every word of that appears to me to apply to a sale of fertilisers, and to be an authority for the view that we are taking. This provision for the delivery of the invoice is a provision for the way in which contracts for the sale of fertilisers are to be performed, and if the invoice is not delivered on or before or after the delivery of the article sold and the vendor has no reasonable excuse for the omission, he will have performed the contract illegally, and he cannot recover the price. On the question which has been raised as to the construction of the words "without prejudice to any civil liability" in s. 6, sub-s. 1, I have nothing to add to what was said by Scrutton L.J. I agree that they mean "without prejudice to *his*, the vendor's, civil liabilities," if any such there be. I also agree with the other members of the Court that there was no evidence on which the judge could find that the vendors had any reasonable excuse for not delivering the invoice. Here it was quite possible to state what were the respective percentages of the ingredients in the "salvage," though it might possibly have been expensive

(1) (1847) 4 C. B. 376. (2) 9 B. & C. 192.
(3) 4 C. B. 398.

to do so. But even if it were impossible I do not think that that would be any excuse. The probability is that the statute intended to prevent people dealing at all in artificial manures where for some reason it was impossible to have an analysis. I agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for the appellant: *Eland, Nettleship & Butt, for Arthur Wood & Wright.*

Solicitors for the respondents: *Bell, Brodrick & Gray, for Arthur A. Hall, Malton.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1923 *Nov.* 5, 6.

HARPER *v.* HEDGES.

[1921. H. 5111.]

Statute—Presumption of.

Judgment of McCardie J. reversed on the facts:—

Quaere, whether, for the purpose of giving legal validity to an act otherwise illegal, an Act of Parliament can under any circumstances be presumed to have been made and lost within the last hundred and fifty years.

THIS was an appeal from a judgment of McCardie J. reported [1923] 2 K. B. 314.

In the year 1749 the rector of the parish of Broughton in the county of Bucks was seized of the parsonage house and glebe, containing in all about fourteen acres. The whole of the other land in the parish was the property of the lord of the manor. In that year a private Act was passed which provided that for the considerations therein specified the said land of the lord should thenceforward be charged with "all such parliamentary and parochial taxes rates and assessments as shall from time to time be taxed charged or assessed upon the said parsonage house, outhouses, yard, garden, orchard and glebe lands hereinbefore mentioned or described"

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or upon the rector and his successors in respect of the same. In 1785 a deed of exchange was executed, the parties to which were the bishop of the diocese, the rector, and the lady of the manor, whereby the parsonage house was exchanged for another house in the parish which was thenceforward used as the parsonage house. The deed was made with the fullest formality, and after the amplest investigation as to the propriety of the exchange. There was no substantial increase in the burden of the said rates and taxes by the substitution of the new for the old parsonage house. By a subsequent deed of exchange made between the lord of the manor and the rector the glebe was exchanged for other land in the parish. After 1785 the owner of the manorial lands ceased to pay the taxes and rates charged upon those lands under the Act of 1749, and no proceeding was brought to enforce the charge within sixty years before the commencement of the present action. In 1910 the plaintiff was appointed to the rectory of Broughton, and he paid the rates and taxes in respect of the new parsonage and glebe. In 1921 he brought this action against the owner of the manorial lands, claiming a declaration that he was entitled to recover the amount of the rates and taxes that he had paid during the preceding eleven years, and that the defendant was liable to pay them thenceforward. For the defendant it was contended: (1.) That the charge created by the Act of 1749 was only in favour of the specific parsonage house and glebe therein mentioned; (2.) that, by virtue of the statute 13 Eliz. c. 10, which prohibited the permanent alienation of a parsonage, the purported substitution of the new parsonage house for the old was invalid and did not bind the defendant; and (3.) that the plaintiff's right of action, if any, was barred by s. 29 of the Real Property Limitation Act, 1833, which provides that no action shall be brought by any spiritual corporation sole to recover any rent except within sixty years after the right shall have first accrued, the word "rent" being defined by s. 1 to include "all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)."

McCardie J. held that, on the true construction of the Act of 1749, the benefit to the rector for the time being of the charge thereby imposed was not limited to the original parsonage house and glebe, but extended to the new parsonage house and glebe; that under the circumstances he was justified, in the absence of evidence of statutory authority for the exchange, in presuming that an Act of Parliament giving validity to the deed of 1785 was passed and lost since the making of that deed; and that the charge on the defendant's land was a "composition" and not a "rent" within the meaning of s. 1 of the Real Property Limitation Act, 1833, and that the plaintiff was consequently not barred by lapse of time. He accordingly gave judgment for the plaintiff.

The defendant appealed to the Court of Appeal.

Clauson K.C. and *Eales* for the appellant.

Sir Malcolm Macnaghten K.C. and *Edwardes Jones* for the respondent.

The Court (BANKES, SCRUTTON and ATKIN L.JJ.) held that the charge given by the Act of 1749 was in respect of the rates and taxes on the specific parsonage house and glebe therein described, and that on the substitution of a new parsonage house and glebe it came to an end. Under these circumstances it became unnecessary for the Court to give any decision upon the other points of law dealt with in the judgment of McCardie J., but all the members of the Court took the opportunity to say that, if it had been necessary to decide the point, they would have had great difficulty in presuming an Act of Parliament passed and lost within the last hundred and fifty years.

Appeal allowed.

Solicitors for the appellant: *Halse, Trustram & Co., for F. T. Tanqueray, Woburn.*

Solicitors for the respondent: *Markby, Stewart & Wadesons.*

J. F. C.

1923
Nov. 13, 14, 18.

GREAT SOUTHERN AND WESTERN RAILWAY COMPANY OF IRELAND *v.* THE KING.

Crown—Contract with Government Department—Work to be carried out in Southern Ireland—Contract still executory—Transfer of Powers and Liabilities to Irish Free State—Effect on Contract—Ministry of Transport Act, 1919 (9 & 10 *Geo.* 5, *c.* 50), *s.* 2—*Ministry of Transport* (*Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property*) *Order*, 1920 (*December* 3, 1920)—*Irish Free State* (*Agreement*) *Act*, 1922 (12 *Geo.* 5, *c.* 4), *s.* 1, *sub-s.* 2, *Schedule, art.* 17—*Provisional Government* (*Transfer of Functions*) *Order*, 1922 (*April* 1, 1922)—*Irish Free State Constitution Act*, 1922 (*Sess.* 2) (13 *Geo.* 5, *c.* 1), *s.* 1, *Schedule, art.* 80.

By agreements made in 1917 and 1918 between the suppliants, an Irish railway company, and the Board of Trade, certain alterations were to be made on the suppliants' railway in Southern Ireland for the purpose of providing the traffic accommodation required under the war-time conditions then existing, and at a subsequent date a reconstruction of the line at the points in question was to be effected. At the material time the agreements were still executory. By a petition of right the suppliants claimed a declaration that the liability of the Ministry of Transport, as the successors in this matter of the Board of Trade, was still subsisting and had not been transferred to the Government of the Irish Free State by legislation subsequent to the agreements:—

Held, dismissing the petition, that by virtue of the Irish Free State (Agreement) Act, 1922, the Provisional Government (Transfer of Functions) Order, 1922, and the Irish Free State Constitution Act, 1922, the liability (if any) under the agreements had ceased to be that of the Ministry of Transport and had been transferred to the Government of the Irish Free State.

PETITION OF RIGHT.

The suppliants, whose registered office was in Dublin, alleged that by a verbal contract dated March 20, 1917, confirmed by letter, and also by a contract contained in letters dated in 1918, made between them and the Board of Trade, it was agreed that in consideration of the suppliants taking up the rails and sleepers on a portion of their line, and transferring them to the Board of Trade for the purpose of being used in the construction of a railway between Athy, one of the suppliants' stations, and Wolfhill collieries, and another railway to Castlecomer, the Board of Trade would pay the suppliants (1.) the cost of replacing the rails and sleepers so taken up with new rails and sleepers; (2.) the

cost of alterations at certain stations rendered necessary for working each of the said portions of their system as a single instead of a double line of railway; and (3.) such a sum as would represent the cost of reconstructing the same as a double line.

The suppliants alleged that they took up the rails and sleepers on their system on the portions of their line in question, and incurred costs in altering their stations.

By letters in April and May, 1922, addressed to the suppliants, the Ministry of Transport, as successors of the Board of Trade, disclaimed liability to perform the said agreements, and claimed that the liability had been transferred to the Ministry of Economic Affairs of the Provisional Government of Ireland; but the suppliants did not accept that contention, and claimed that the Board of Trade or the Ministry of Transport as their successors remained liable. Accordingly the suppliants claimed (1.) a declaration that the contention of the Ministry of Transport was not well founded and that they were entitled to payment of the amounts due under the agreements from the Board of Trade or their successors the Ministry of Transport; (2.) the sum of 44,763*l.* that would be incurred by them under the agreements when the lines were relaid; and (3.), in the alternative, an inquiry as to what was a fair sum to be paid to them under the agreements.

By his answer and plea the Attorney-General said that the suppliants were a corporation domiciled in Southern Ireland, and that the liability (if any) under the agreements was transferred to the Irish Ministry of Economic Affairs under and by virtue of the Ministry of Transport Act, 1919; the Ministry of Transport (Board of Trade Exception of Powers) Order, 1919; the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920; the Irish Free State (Agreement) Act, 1922; the Provisional Government (Transfer of Functions) Order, 1922; the Irish Free State Constitution Act, 1922 (Sess. 2); the Irish Free State (Consequential Provisions) Act, 1922 (Sess. 2); and the Adaptation of Enactments Act, 1922, passed by the Irish Free State Legislature; that

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the liability (if any) had ceased to be chargeable upon Imperial revenue, and had become chargeable upon the revenue of the Irish Free State; that under the agreements the Board of Trade agreed to pay the reasonable cost of work actually done and moneys actually expended by the suppliants, and that unless and until such work was done and moneys expended no moneys became payable to the suppliants; that none of the moneys claimed were for the cost of work actually done or moneys actually expended; and that the suppliants' present claim was not maintainable.

Sir John Simon K.C., *Hawke K.C.* and *J. F. Eales* for the suppliants. The liability of the British Government under these agreements has not been transferred to the Irish Free State. Express words are necessary to produce such a result, and no such words are contained in the legislation relied on in the answer and plea of the Attorney-General. Art. 17 of the Agreement for a Treaty between Great Britain and Ireland, which is scheduled to the Irish Free State (Agreement) Act, 1922, says: "By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State . . . . steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland . . . . and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties. . . . . " That certainly did not purport to transfer any liabilities; and s. 1, sub-s. 2, of the Irish Free State (Agreement) Act, 1922, merely enabled Orders in Council to be made "for the purpose of giving effect to art. 17 of the said Agreement," although "any Order in Council under this section may contain such incidental, consequential, or supplemental provisions as may appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of this section." The Provisional Government

(Transfer of Functions) Order, 1922 (April 1, 1922), made under that power did not purport to transfer liabilities, and could not relieve the British Government from accrued obligations. With regard to the Adaptation of Enactments Act, 1922, passed by the Irish Free State Legislature, it is sufficient to point out that it was not within the competence of the Irish Free State to pass an Act depriving the suppliants of their rights in the Courts of this country against the British Government.

Sir Douglas Hogg A.-G. and *Giveen* for the Crown. First, there is no obligation to pay under the agreements in question until the work has been completed. The contracts are still executory, and it would not be right to make a declaration to operate in futuro.

Secondly, no liability now rests upon the British Government in respect of the agreements. The department originally liable was the Board of Trade, but by s. 2 of the Ministry of Transport Act, 1919, various powers and duties, including (inter alia) those relating to railways, were transferred to the Ministry of Transport as from such date as His Majesty in Council might by Order determine, and by the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920, dated December 3, 1920, all the property, rights and liabilities of the Board of Trade in connection with the railway lines dealt with in the agreements were transferred to the Ministry of Transport as from December 3, 1920. By the Irish Free State (Agreement) Act, 1922, Ireland was given the same constitutional status as the Dominion of Canada, and by s. 1, sub-s. 2, Orders in Council might be made transferring to the Provisional Government the powers and machinery requisite for the discharge of its duty, and such Orders might contain "such incidental, consequential, or supplemental provisions" necessary to give effect to s. 1. By virtue of the power so given the Provisional Government (Transfer of Functions) Order, 1922, dated April 1, 1922, was made, and by Part I. of the Schedule thereto "the administration of services in connection with trade and commerce, transport, electricity and

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shipping, including functions hitherto performed by the following existing Government departments and officers:— the Minister of Transport; the Board of Trade" were transferred to the Ministry of Economic Affairs of the Provisional Government. By virtue of that provision, coupled with arts. 6 and 12 of the same Order, which respectively transfer "the functions of existing Government departments" and "any property, assets, rights and liabilities connected with the functions transferred," it is clear that the liability under the agreements ceased to be that of the Ministry of Transport. Art. 13 (vi.) substitutes the name of the appropriate Irish department for that of the British department whose functions have been transferred. That legislation was followed by the Irish Free State Constitution Act, 1922 (Sess. 2), which made the Constitution set forth in Sch. I. the Constitution of the Irish Free State. By art. 80 of that Constitution it is provided that "as respects departmental property, assets, rights and liabilities, the Government of the Irish Free State shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State, as the successors of such department of the British Government." From the date of the Irish Free State Constitution Act, 1922 (Sess. 2), therefore, the Government of the Irish Free State, as the successors of the Provisional Government, took over the liabilities of the British Government in connection with Southern Ireland. This is again recognized by s. 15 of the Adaptation of Enactments Act, 1922, passed by the Legislature of the Irish Free State. The Irish Free State Government could competently legislate for its own citizens in Ireland.

Sir John Simon K.C. in reply. In considering whether there has been a valid transfer of the liability of the British Government under these agreements to the Irish Executive, it is essential to observe the very different language used in the transfer from the Board of Trade to the Ministry of Transport and the transfer effected by art. 17 of the Treaty and the Irish Free State (Agreement) Act, 1922. Sect. 2

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of the Ministry of Transport Act, 1919, provides for the transfer of certain powers and duties to the Minister of Transport, and sub-s. 2 says that "His Majesty in Council may by Order make such incidental, consequential and supplemental provisions as may be necessary or expedient for the purpose of giving full effect to any transfer of powers or duties by or under this section, including provisions for the transfer of any property, rights and liabilities held, enjoyed, or incurred by any Government department in connexion with any powers or duties transferred." Art. 17 of the Treaty merely speaks of the transfer of "powers and machinery," and makes no reference to property, rights and liabilities. No statute says that the liabilities of the Ministry of Transport are transferred to the Irish Free State. Express words are necessary to create a new debtor. The Irish Free State Legislature cannot destroy the contractual right of the suppliants against the British Crown, and it is doubtful if they ever purported to do so. Moreover, the matter involved in the agreements in question was not purely Irish so as to be transferred to the Irish Free State. The contracts were made for the benefit of the United Kingdom as a whole to enable the country to carry on the war successfully.

Cur. adv. vult.

Nov. 18. ROWLATT J. read the following judgment: The question raised in these proceedings is whether the burden of certain agreements made by the Board of Trade during the war has passed to the Government of the Irish Free State or still rests with the Government of Great Britain. The effect of these agreements was that the Board of Trade undertook to bear the cost of replacing certain rails and sleepers which were to be removed from a railway line belonging to the suppliants in Southern Ireland and used elsewhere in Southern Ireland for the purpose of providing traffic accommodation required under war-time conditions then existing. When the removal was effected the Board of Trade allowed the suppliants the value of this material, and when the

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replacement takes place the suppliants will have to make a corresponding allowance. The replacement has not yet taken place, and consequently no payment has yet become due. What is really sought is a declaratory judgment.

By Order in Council of December 3, 1920, made under the Ministry of Transport Act, 1919, the liabilities of the Board of Trade under these agreements were transferred to the Ministry of Transport.

By art. 1 of the Agreement for a Treaty between Great Britain and Ireland dated December 6, 1921, Ireland was to have the same constitutional status in the British Empire as the Dominion of Canada. This obviously involves the transfer to the Irish Free State Government of all functions, so far as exercised in Southern Ireland, of every British Government department, and such transfer has undoubtedly taken place. The question is whether the liability under these agreements has also been transferred. It should, I think, be borne in mind that this liability is not a mere money demand, but is one to mature hereafter under agreements still executory, and depends for its accrual and will be governed in its amount by the execution of works in Southern Ireland which the Government concerned, whichever it is, will have the right to check. Moreover, the parties to these agreements, whoever they now are, must have the right by arrangement to modify or cancel them.

By art. 17 of the Agreement for the Treaty it was provided that by way of provisional arrangement, pending the constitution of a Parliament and Government of the Irish Free State, the British Government should take the steps necessary to transfer to the Provisional Government the "powers and machinery" requisite for the discharge of its duties, and the Irish Free State (Agreement) Act, 1922, by s. 1, sub-s. 2, authorized the making of Orders in Council for that purpose. By the last clause of that sub-section any such Order in Council might contain such incidental, consequential, or supplemental provisions as might appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of the section.

On April 1, 1922, an Order in Council was made under this enactment, of which the following were the material provisions : arts. 1, 3 (i.), 6 (i.) (iii.), 12, 13 (vi.), and Schedule. The effect of art. 12, read with art. 1, is to transfer to the Provisional Government any property, assets, rights, and liabilities connected with the functions in connection with the administration of the public service in Southern Ireland theretofore performed by, among other departments, the Ministry of Transport. This, as I read it, manifestly purports to transfer the liability now in question ; and the effect of art. 13 (vi.), read with the Schedule, seems to me to substitute in these agreements the name of a department of the Provisional Government for that of the Ministry of Transport.

It was, however, contended by Sir John Simon that the power conferred by the last clause of s. 1, sub-s. 2, of the Irish Free State Agreement Act, 1922, was only to include incidental, consequential, or supplemental provisions necessary or proper for giving effect to the transfer of " powers and machinery " as mentioned in that sub-section, and in art. 17 of the Treaty, and that the transfer of the liability now in question was not within that power. Whether the second step in this argument would be sound or not I do not pause to consider, because I think the first is based on a misreading of the clause. The purpose mentioned in the clause is that of giving effect to the foregoing provisions, not of the sub-section or of art. 17 of the Treaty, but of the whole section. This includes sub-s. 1, which gives the Treaty the force of law, and thereby, among other things, gives Ireland the status of a Dominion, a change which, as I have already pointed out, clearly involves the taking over of all departmental liabilities.

By the Irish Free State Constitution Act, 1922 (Sess. 2), it was enacted that the Constitution which had, in the meantime, been enacted by the Constituent Assembly in Ireland should be the Constitution of the Irish Free State, and by art. 80 of that Constitution it was provided : " As regards departmental property, assets, rights, and liabilities, the Government of the Irish Free State shall be regarded as the successors of the Provisional Government, and, to the extent

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to which functions of any department of the British Government become functions of the Government of the Irish Free State, as the successors of such department of the British Government."

The only other enactment I think it necessary to mention is one by the Irish Free State Legislature—namely, the Adaptation of Enactments Act, 1922, s. 15. I do not think this enactment purports to transfer any liability from the British to the Irish Government. I think it is merely distributing among the Irish Free State Government departments contractual rights and liabilities already transferred as between the two Governments by the enactments I have already recited, culminating in art. 80 of the Constitution, but interdepartmentally distributed in Ireland by the Order in Council of April 1, 1922, only for the term of existence of the Provisional Government.

With reference to these enactments, it was argued by Sir John Simon that they did not touch the liability now in question, which he described for the purposes of his argument as "a liability of the British Crown." I am not sure that I correctly appreciate the conception put before me. If this is a departmental liability incurred originally by the Board of Trade in the course of exercising its functions as such in Ireland, and in that sense is a "liability of the British Crown," I can only say that I think the enactments referred to in terms transfer it. If, however, it is contended that the Board of Trade created what I may call an extra-departmental liability, something, say, on a level with the National Debt, I should want to be referred to the statutory provisions under which this has been done.

In my judgment this petition, which, though addressed to the Sovereign of the whole Empire, I must treat as embodying a claim against the British Exchequer only, must be dismissed with costs.

Judgment for Crown.

Solicitors for suppliants: *Peacock & Goddard.*
Solicitor for Crown: *Treasury Solicitor.*

J. S. H.

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Oct. 26, 29;
Nov. 19.

Licensing—Restaurant—Licensed Premises—Internal Communication—Excise Licence—Monopoly Value—Justices' Licence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 70—*Finance Act*, 1911 (1 *& 2 Geo.* 5, *c.* 48), *s.* 4.

Messrs. Harrods were the owners of a large block of buildings, in one room of which they had an off-licence. In another room they had a restaurant which communicated with rooms used by the public, and in respect of this restaurant the justices granted a licence, confined by metes and bounds to the actual restaurant, which licence was duly confirmed.

In another part of the premises was a cellar to which the public had no access, from which Messrs. Harrods supplied the wants of the restaurant and of the off-licence. The justices fixed the monopoly value as the difference between the value of the restaurant when unlicensed and its value when licensed :—

Held, that the Licensing (Consolidation) Act, 1910, s. 70, did not interfere with the power of the justices to grant a licence to premises with such internal communication, although the owner was not entitled to use it; and that the decision of the justices as to the monopoly value was correct.

The Finance Act, 1911, s. 4, was passed for purposes of excise, and does not limit the rights of justices in granting a licence.

Case stated by the confirming authority of the County of London under the Licensing (Consolidation) Act, 1910.

At a licensing meeting held at Kensington in the County of London on February 27, 1923, the licensing justices for the Kensington Division granted an excise licence to the respondent. This licence authorized him to sell by retail at the licensed premises situated at the refreshment rooms forming the fourth floor at Nos. 13 to 35 Hans Road, Kensington, and other the premises connected therewith known as Harrods' Georgian Restaurant, any intoxicating liquor which might be sold under a publican's licence for consumption either on or off the premises. The owners of the premises were stated on the licence to be Messrs. Harrods, Ld., and the licence was granted for two and a quarter years subject to conditions indorsed thereon. The conditions so indorsed were :—

(1.) Intoxicating liquor to be sold or consumed only

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between the hours of 12 noon and 3 P.M. in the Georgian Restaurant.

(2.) No bar to be erected or used on the premises except for service, nor intoxicating liquor to be served except with meals.

(3.) The character of the restaurant business now carried on at the premises not to be altered.

(4.) The premises to be closed on Sundays and public holidays.

(5.) The monopoly value to be 500*l.*, payable in two instalments of 250*l.* on October 1 in each year.

This licence was confirmed by the confirming authority on April 30, 1923, but at the request of the appellants a case was stated for the opinion of the High Court. This case (paras. 1 to 13) was as follows :—

1. The above-named respondent is the secretary of Harrods, Ld. (hereinafter called "the said Company"), who carry on a retail business at their premises at Brompton Road, Hans Road, Basil Street and Hans Crescent in the parish of Kensington in the said County of London. The premises comprise a large block of buildings all under one roof or roofs, and access can be obtained from any part of Harrods' premises to any other part without the necessity of going into the public street.

2. The said premises consist of a basement, ground floor and four other floors, and contain numerous departments where a large variety of goods and commodities are sold.

3. On the fourth floor of the said premises there is a restaurant for the use of the public, and access to the said restaurant can only be obtained by lifts or by staircases from the said floors as follows : (1.) by a staircase in the middle of the building at the north-east corner of the restaurant commencing on the first floor and communicating on the second and third floors with the public departments on these floors and giving access to the restaurant. This staircase can be approached from the street only by going through one or other of the public departments of Harrods' Stores ; (2.) by lifts in two parts of the restaurant which communicate

with the ground floor and all intermediate floors and again can be approached from the street only by going through one or other of the public departments in the Stores; (3.) by a staircase giving access direct from Hans Road—this staircase runs from the ground up to the restaurant on the fourth floor. On the ground floor and on each intermediate floor there is access to this staircase by doors from the various public departments, but it is not necessary actually to pass through any of the departments of the Stores to obtain access to the restaurant from Hans Road by means of this staircase; (4.) by an emergency exit staircase leading from the restaurant directly down into Hans Road and again communicating on each of the intermediate floors and on the ground floor with the public departments on these floors. This staircase is kept solely as an emergency exit, and is not actually used either by the public or the staff. No part of the fourth floor other than that occupied by the restaurant is open to the public.

4. There is no structural separation between the said restaurant and the remainder of the premises occupied by Messrs. Harrods and used by them for their general business.

5. The departmental manager, Mr. Miln, is on behalf of the said company licensed to sell wine and spirits for consumption "off" the premises in wholesale or retail quantities. The "off" licence department to which the public have access consists of two counters with storage space under and at the back of the counters on the ground floor close to the corner of Brompton Road and Hans Road.

6. In connection with the above "off" licences there is a large cellar in the basement on the Hans Road side of the property, to which the public have no access. This cellar is used in connection with the off-licences, and (except as hereinafter stated) it is not used or intended to be used in connection with the restaurant.

7. The course of business in connection with the restaurant is intended to be as follows: On that floor and as part of the restaurant there is a store-room, and customers taking intoxicating liquors in the restaurant will be served solely from

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that store-room. The store will be replenished daily from the off-licence cellar, just as the rest of the requirements of the restaurant are satisfied daily by supplies drawn from the other departments, but except to this extent the stock in the cellar will not be used at all in connection with the restaurant. The above practice has been followed since May, 1922, in connection with the wine licence hereinafter referred to.

8. The communication from the basement cellar with the restaurant by means of which the stock in the restaurant will be replenished daily is by means of a goods lift, which runs from the basement close to, but not inside the cellar, up through the various floors to the restaurant, and this lift will be used not only for intoxicating liquors but also for supplies of any sort going up to the restaurant.

9. At the general annual licensing meeting of the Kensington justices in February, 1922, a wine "on" licence was granted to the respondent in respect of the said restaurant and was duly confirmed. Under the authority of this licence, wine has been sold for consumption on the premises in the said restaurant since May, 1922.

10. On January 5, 1923, the respondent, intending to comply with the requirements of s. 15, sub-s. 1 (*c*), (*d*), of the Licensing (Consolidation) Act, 1910, gave notice in writing of his intention to apply for the grant of the justices' licence authorizing him to hold an excise licence to sell in the said restaurant by retail any intoxicating liquor which may be sold under a publican's licence for consumption either on or off the premises. [A copy of the notice and a plan of the premises were annexed.]

11. At their adjourned general annual licensing meeting held at Kensington aforesaid on February 27, 1923, the licensing justices for the said division granted to the respondent the licence. [A copy of this licence, which has been already described, was annexed to the case.]

12. The said sum of 500*l.* was fixed by the said licensing justices and by the said confirming authority on the assumption that the said licence covered the restaurant

only, and does not include any sum in respect of the sale by retail of intoxicating liquors for consumption off the premises.

Should it be held that the said licence cannot lawfully be granted for the said restaurant only, but would have to be granted for the whole of the said premises subject to restrictions as to the parts where and the conditions on which the sales would take place, the sum payable for monopoly value would be largely in excess of this amount.

13. At the meeting of the said confirming authority for the County of London, held at the Sessions House, Newington, on April 30, 1923, the respondent by his counsel applied for a confirmation of the said new licence, and the appellants appeared by their representative and were heard upon the question of the legality of the said licence and the monopoly value, and the facts above stated were either proved or admitted.

The appellants contended that the confirming authority had no jurisdiction to confirm and could not lawfully confirm the said new licence, as it was not lawful for the said licensing justices to grant a licence covering the said restaurant only, it being contended by the said appellants that if any licence were granted to the said respondent the whole of the said premises of Harrods' Stores should be included in the said licence, and the monopoly value increased accordingly.

The respondent contended to the contrary, and that the said new licence was valid and ought to be confirmed.

The authority decided to make an order confirming the new licence subject to the opinion of the High Court upon the question of law, whether on the facts above stated the new licence could lawfully be granted by the licensing justices in the said form.

Sir Douglas Hogg A.-G. and *Bowstead* for the appellants. The justices had no jurisdiction to grant this licence. The existence of the internal communication between the restaurant and the rest of the premises is an absolute bar to the grant of a licence except in respect of the whole premises. By the

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Licensing (Consolidation) Act, 1910, s. 70 (1), a person holding a justice's licence where such communication is "made or used" forfeits the licence and is liable to a heavy fine. The premises with which this communication exists are a "place of public resort" within the meaning of s. 70, sub-s. 1, being premises "habitually used by the public," as the expression was interpreted by this Court in *Kitson* v. *Ashe*. (2)

By the Finance Act, 1911, s. 4 (1), the licence must extend to the cellar which is used by the licence holder for storing liquor. The justices were wrong in only taking into account the fourth floor in reckoning the monopoly value. Their proper course was to take into account the whole premises, and then limit the licence to the fourth floor.

Sir H. Curtis Bennett K.C. and *St. John Hutchinson* for the respondents. The provisions of the Licensing (Consolidation) Act, 1910, s. 70 (1), originally appeared in the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 45, long before the existence of large stores was contemplated. Its purpose was to prevent communication between public-houses and places of low entertainment. The same provisions were re-enacted in the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 9. The grant of an on-licence in respect of

(1) Licensing (Consolidation) Act, 1910, s. 70, sub-s. 1: "A person shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public entertainment or resort, or as a refreshment house."

Sub-s. 2: "If any person acts in contravention of this section he shall be liable to a fine not exceeding 10*l.* for every day during which the communication remains open, and in addition shall, if he is the holder of a justice's licence, forfeit that licence."

Finance Act, 1911, s. 4: The following definition shall be substituted, as from April 1, 1911, for the definition of premises contained in s. 52 of the Finance (1909-1910) Act, 1910:

"The expression 'premises' in relation to the annual value of licensed premises includes . . . . any building or place which, though not within the curtilage, or in the immediate vicinity, of the house or place where the liquor is sold, is used by the licence holder for receiving or storing liquor, or which, in the opinion of the Commissioners, is used by him, otherwise than occasionally, for any purpose in connection with the sale of liquor."

(2) [1899] 1 Q. B. 425.

part of premises and of an off-licence in respect of the whole was clearly contemplated by the Legislature in the Finance (1909–10) Act, 1910, First Schedule, "Provisions applicable to Retailers' Licences," clause 2, where it is provided that an off-licence shall not be granted to the holder of an on-licence, "if the off-licence authorises the sale of any liquor which the holder of the on-licence is not authorised to sell by retail under his on-licence."

The evil aimed at by the Licensing (Consolidation) Act, 1910, s. 70 (1), was that of an internal communication between licensed premises and *other* premises not licensed which are used for public resort.

Bowstead in reply cited *Stringer* v. *Huddersfield Justices.* (2)

Cur. adv. vult.

Nov. 19. The judgment of the Court (LORD HEWART C.J., SANKEY and SALTER JJ.) was read by Sankey J. Messrs. Harrods are the owners of a large block of buildings, in one room of which they had an off-licence, which did a considerable trade. In another part they had a restaurant, which communicated with stairs and rooms used and resorted to by the public, which restaurant was without a licence. They applied to the justices to license the restaurant, and the justices did so, confining the licence by metes and bounds to the actual room in which the restaurant was situated. In another part of the premises there was a cellar, to which the public had no access, from which Messrs. Harrods supplied the wants of the restaurant and of the off-licence. The justices fixed the monopoly value of the licence for the restaurant as the difference in value between the room in which it was held as licensed and as unlicensed.

The Crown contended that they had no power to do so; that they could only license the whole of the premises, in which event the monopoly value would be very much greater, because it would be necessary to take into consideration the trade

(1) See note (1) ante, p. 168. (2) (1875) 40 J. P. 22; 33 L. T. 568.

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of the off-licence as well as the trade done in the room actually used for the restaurant. In this way a monopoly value would be obtained, in fact, for the off-licence, which otherwise would not be payable. The Attorney-General referred to several sections of the Licensing (Consolidation) Act, 1910, but he based his argument mainly on s. 70 of that Act and s. 4 of the Finance Act, 1911. (1) He contended, under the former section, that the justices had no power to grant a licence to premises which had an internal communication with any premises, not being licensed premises, which were used for public entertainment or resort, as these licensed premises in fact had been.

We think that this is a misapplication of s. 70. That section finds its place among a number of others, beginning with s. 65, dealing with general regulations as to sale of liquor and conduct of licensed premises. It assumes a justices' licence already in existence, and says that such licence shall be forfeited if the licensee makes or uses an internal communication therefrom into a place of public resort. The making a place must refer to an act done by the owner of the premises after the licence has been granted. The using of such a place may refer to using a place which was there either before or after the granting of the licence, there being an obligation, if there is such a place, that the licensee shall not make use of it. This indicates that the licensing justices have power to grant a licence to premises with such an internal communication as aforesaid, although the owner of the premises is not entitled to use such communication, and this construction of the section is in accord with the reasoning of the decision in *Stringer* v. *Huddersfield Justices.* (2)

We are of opinion that s. 70 does not prohibit the justices from granting a licence prescribed by metes and bounds to a place like the restaurant under discussion in this case. With regard to s. 4 of the Finance Act, 1911, we think that the object and intent of that section, which was substituted for the definition of the word "premises" in s. 52 of the Finance (1909–10) Act, 1910, was for an entirely different

(1) See note (1) ante, p. 168. (2) (1875) 40 J. P. 22; 33 L. T. 568.

purpose from that of granting a licence—namely, that of excise—and was not meant to limit the rights of the justices. We cannot, therefore, hold that the discretion of the justices as to granting a licence was fettered in the way suggested by either of the sections referred to, or by any of the other sections cited. There was nothing in law to prevent them from granting the licence which they did to the room in question, nor was their jurisdiction confined either to granting a licence to the whole of Messrs. Harrods' premises, or not granting one at all. In the result, we are of opinion that their decision as to the monopoly value was correct, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor for Commissioners of Customs and Excise.*

Solicitors for respondents: *Martineau & Reid.*

F. P. F.

Observations of ATKIN, L.J., at p. 205, *applied.* R. *v.* MANCHESTER LEGAL AID COMMITTEE. [1952] 1 All E.R.480.

Considered. AMERICAN ECONOMIC LAUNDRY LD. *v.* LITTLE [1951] 1 K. B. 400

[IN THE COURT OF APPEAL.]

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July 9, 10, 11, 12, 27.

THE KING *v.* ELECTRICITY COMMISSIONERS.

Ex parte LONDON ELECTRICITY JOINT COMMITTEE COMPANY (1920), LIMITED, AND OTHERS.

Prohibition—Certiorari—Electricity Commissioners—Scheme—Electricity District—Joint Electricity Authority—Delegation of Powers—Separate Committees—Draft Order—Operation subject to Confirmation and Approval—Minister of Transport—Resolutions of Parliament—Electricity (Supply) Act, 1919 (9 *& 10 Geo.* 5, *c.* 100), *ss.* 5, 6, 7.

The Electricity Commissioners, a body established by s. 1 of the Electricity (Supply) Act, 1919, are empowered by that Act to constitute provisionally separate electricity districts and in certain events to formulate schemes for effecting improvements in the existing organization for the supply of electricity in any electricity district so constituted, and are directed to hold local inquiries upon the schemes. A scheme so formulated may provide for the incorporation of a joint electricity authority representative of authorized undertakers within the electricity district.

By s. 6, sub-s. 2, of the Act a scheme may provide for enabling the

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joint electricity authority to delegate, with or without restriction, to committees of the authority any of the powers or duties of the authority. By s. 7, sub-s. 1, the Commissioners may make an order giving effect to a scheme embodying the decisions they arrive at after holding a local inquiry, and present the order for confirmation by the Minister of Transport. By s. 7, sub-s. 2, the order after confirmation is to be laid before each House of Parliament and is not to come into operation until approved, with or without modification, by a resolution passed by each House, and when so approved is to have effect as if enacted in the Act of 1919.

The Commissioners constituted an electricity district and formulated a scheme providing for the incorporation of a joint electricity authority which purported to be representative of the authorized undertakers, both local authorities and electricity companies, in the district so constituted. The scheme provided that the joint authority should at its first meeting appoint two committees, namely a local authority committee and a company committee, and assigned to each of these committees definite and separate portions of the electricity district, and delegated separate powers and duties to each committee in respect of the portion assigned. The Commissioners began to hold a local inquiry with a view to making an order embodying the scheme.

Certain companies affected by the scheme applied for writs of prohibition and certiorari on the ground that the scheme was ultra vires in so far as it compelled the joint authority to appoint the two committees and delegate to them powers and duties of the joint authority :—

Held, that the scheme was ultra vires, and that a writ of prohibition should issue prohibiting the Commissioners from proceeding with the further consideration of the scheme, notwithstanding that an order embodying the scheme could not come into operation until confirmed by the Minister of Transport and approved by resolutions of the Houses of Parliament.

Church v. *Inclosure Commissioners* (1862) 11 C. B. (N. S.) 664 approved and followed.

Reg. v. *Hastings Local Board* (1865) 6 B. & S. 401 distinguished.

Order of Divisional Court reversed.

APPEALS from orders of a Divisional Court discharging a rule nisi for a prohibition and a rule nisi for a certiorari, which rules had been granted on the motion of the London Electricity Joint Committee Company (1920), Ld., hereinafter called the Joint Committee Company, the City of London Electric Lighting Company, Ld., the County of London Electric Supply Company, Ld., the Notting Hill Electric Lighting Company, Ld., the South London Electric Supply Corporation, Ld., the South Metropolitan Electric Light and Power Company, Ld., and the West Kent Electric Company, Ld., hereinafter called the relators.

The Electricity Commissioners were established by s. 1, sub-s. 1, of the Electricity (Supply) Act, 1919, to promote, regulate, and supervise the supply of electricity and to exercise and perform the powers and duties conferred and imposed upon them by the Act, and subject thereto to act under the general directions of the Board of Trade. (1) By sub-s. 2 they are not to exceed five in number, of whom one is to be chairman, and are to be appointed by the Board of Trade. (1)

By s. 5, sub-s. 1, of the Act they may provisionally determine that any district in the United Kingdom shall be constituted a separate electricity district for the purposes of the Act, and, in considering what areas are to be included in a district, areas shall be grouped in such manner as may seem to the Commissioners most conducive to the efficiency and economy of the supply of electricity and to convenience of administration. Before finally determining the area of the district, they are to publish notice of their intention so to do and of the area proposed to be included in the district, and also to give notice thereof to all county councils, local authorities, and authorized undertakings any part of whose county district or area of supply is proposed to be included in the district, and, if any objection or representation is made on account of the inclusion in or the exclusion from the proposed district of any area, the Commissioners are to hold a local inquiry with reference to the area to be included in the proposed district.

By sub-s. 2 where it appears to the Commissioners with respect to any electricity district so provisionally determined that the existing organization for the supply of electricity therein should be improved, they are to give notice of their intention to hold a local inquiry into the matter, and to give to authorized undertakers, county councils, local authorities, railway companies using or proposing to use electricity for traction purposes, large consumers of electricity, and other

(1) Now the Minister of Transport, by virtue of the Ministry of Transport (Electricity Supply) Order, 1920 (Statutory Rules and Orders, 1920, No. 58), made under s. 39 of the Electricity Supply Act, 1919.

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associations or bodies within the district which appear to the Commissioners to be interested, an opportunity to submit, within such time as the Commissioners may allow, a scheme or schemes for effecting the improvement, including proposals for altering or adjusting the boundaries of the district and, where necessary, the formation of a joint electricity authority for the district. By sub-s. 3 if no scheme is submitted within the time so allowed, or if no scheme submitted is approved by the Commissioners, they may themselves formulate a scheme. By sub-s. 4 the Commissioners are to publish, in such manner as they think best adapted for ensuring publicity, any scheme which they have approved, with or without modifications, or which they have themselves formulated, and are to hold a local inquiry thereon.

By s. 6, sub-s. 1, a scheme under s. 5 may provide for the establishment and (where desirable) the incorporation with power to hold land without licence in mortmain, of a joint electricity authority representative of authorized undertakers within the electricity district, either with or without the addition of representatives of the council of any county situate wholly or partly within the district, local authorities, large consumers of electricity, and other interests within the district, and, subject as later in the Act provided, for the exercise by that authority of all or any of the powers of the authorized undertakers within the district, and for the transfer to the authority of the whole or any part of the undertakings of any of those undertakers, upon such terms as may be provided by the scheme, and the scheme may contain any consequential, incidental, and supplemental provisions which appear to be expedient or proper for the purpose of the scheme, including provisions determining the area included in the electricity district: Provided that no such scheme shall provide for the transfer to the authority of any part of an undertaking except with the consent of the owners thereof.

The Act contains the following provisions: Sect. 6, sub-s. 2, "The scheme may provide for enabling the joint electricity authority to delegate, with or without restrictions, to

committees of the authority any of the powers or duties of the authority." . . . . Sect. 7, sub-s. 1, "The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the order for confirmation by the Board of Trade (1), who may confirm the order either without modification or subject to such modifications as they think fit." Sub-s. 2, " Any such order shall be laid, as soon as may be after it is confirmed, before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act." . . . .

It appeared that the London County Council was unwilling to transfer its powers of purchase unless there were one electricity authority only for the whole district, and that the electric lighting companies were unwilling to transfer their generating stations unless there were two authorities for the district. In order to get rid of this difficulty the Electricity Commissioners in February, 1923, in pursuance of s. 7 of the Act of 1919 and of all other powers enabling them in that behalf, published a document which they described as a " Draft Order under s. 7 of the Electricity (Supply) Act, 1919, constituting the London and Home Counties Electricity District and establishing and incorporating the London and Home Counties Joint Electricity Authority." It proposed as its short title " The London and Home Counties Electricity District Order, 1923." After defining " The Joint Authority " as the London and Home Counties Joint Electricity Authority established under the scheme set out in the schedule to the order; " The District " as the London and Home Counties Electricity District constituted under the said scheme, and " Constituent Body " as any authorized undertaker, county council, or other body entitled under the said scheme to appoint or elect or participate in the election of members of the joint authority, the order provided as follows :—

(1) See note (1) ante, p. 173.

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"3. The scheme set out in the schedule to this order shall operate and have effect, and accordingly the London and Home Counties Electricity District shall be and is hereby finally determined and the London and Home Counties Joint Electricity Authority shall be and is hereby established and incorporated."

"6. This order shall come into operation as soon as it has been approved by a resolution passed by each House of Parliament."

The scheme set out in the schedule to the above order was formulated by the Electricity Commissioners and published by them on February 8, 1923, under s. 5 of the Electricity (Supply) Act, 1919, for effecting an improvement in the existing organization for the supply of electricity in a district comprising London and Middlesex, and portions of Berkshire, Buckinghamshire, Essex, Hertfordshire, Kent, and Surrey, which was to be constituted a separate electricity district and to be called the London and Home Counties Electricity District.

Sect. 2 of the scheme provided that there should be established a joint electricity authority under the name of the London and Home Counties Joint Electricity Authority, a body corporate with a perpetual succession and a common seal and power to hold land without licence in mortmain.

Sect. 3, sub-s. 1, provided that the joint authority should consist of the members specified in the first annex to the scheme, which annex should be deemed to form part of the scheme and have effect accordingly. Sect. 4 provided that the joint authority might appoint such officers and servants at such salaries, wages, or remuneration as the joint authority might determine.

The scheme contained the following sections:—

"7.—(1.) The Joint Authority shall, at their first meeting, appoint two Committees of the Joint Authority, and thereafter keep such Committees appointed until such time as they have exercised and performed the powers and duties conferred upon them under this Scheme. The said Committees shall be constituted in the style and manner following:—

"(*a*) A Committee of Local Authority Undertakers (hereinafter called 'the Local Authority Committee') consisting of eight members appointed or elected by the Local Authority undertakers as set out in Part II. of the First Annex hereto.

"(*b*) A Committee of Company undertakers (hereinafter called 'the Company Committee') consisting of the six members appointed or elected by the Company undertakers within the administrative county of London as set out in Part II. of the First Annex hereto. . . . ."

"9.—(1.) The Joint Authority shall delegate to the Local Authority Committee and to the Company Committee respectively such of the powers and duties of the Joint Authority as are specified in the Third Annex to this Scheme, which Annex shall be deemed to form part of this Scheme and shall have effect accordingly: . . . .

"(2.) Subject as hereinafter provided, the delegated powers and duties specified in the Third Annex shall be exercised and performed by the Local Authority Committee and the Company Committee respectively within the portions of the District specified in the Fourth Annex to this Scheme, which Annex shall be deemed part of this Scheme and shall have effect accordingly. . . . .

"(3.) The Local Authority Committee and the Company Committee respectively shall, in the name and on behalf of the Joint Authority, exercise or perform any delegated power or duty in accordance with the provisions of this Scheme in like manner as the Joint Authority could have exercised or performed such power or duty if the said power or duty had not been delegated to the aforesaid Committees."

By Part I. of the first annex to the scheme it was provided that the members of the joint authority should be appointed by:—

(*a*) Local authorities supplying electricity within the district under statutory powers, therein called "local authority undertakers";

(*b*) companies or persons supplying electricity within

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the Administrative County of London under statutory powers, therein called "company undertakers inside London";

(*c*) companies or persons supplying electricity within the district but outside the Administrative County of London under statutory powers, therein called "company undertakers outside London";

(*d*) power companies supplying electricity within the district under statutory powers, therein called "power companies";

(*e*) county councils whose counties were wholly or partly within the district;

(*f*) the Railway Companies' Association to represent the railway companies operating in the district.

The members of the joint authority were to be appointed or elected by the constituent bodies in the following proportions: eight by the local authority undertakers; six by the company undertakers inside London; one by the company undertakers outside London; one by the power companies; six by the London County Council; three by the other county councils, and two by the Railway Companies' Association.

Part II. of the first annex was headed "Members to be appointed or elected by Constituent Bodies," and was as follows:—

	Members.
1. Authorized undertakers supplying electricity:—	
(*a*) Local authority undertakers	8
(*b*) Company undertakers within the Administrative County of London	6
(*c*) Company undertakers outside the Administrative County of London	1
(*d*) Power companies	1
2. County councils:—	
The London County Council	6
The County Council of Middlesex " " Buckingham }	1

		Members.
The County Council of Essex, ,, ,, Hertford	.. ..	1
,, ,, Surrey, ,, ,, Kent	.. ..	1
3. Railway companies :—		
The Railway Companies' Association	.. ..	2
Total	..	27

The third annex to the scheme was headed "Powers and duties of the Joint Authority to be delegated to the Local Authority Committee and the Company Committee respectively in accordance with the provisions of s. 9 of the Scheme." It contained: 1. Powers and duties relating to the generation and transmission of electricity and to the supply of electricity in bulk to authorized undertakers; 5. The carrying out of negotiations for bulk supplies on behalf of authorized distributors outside the Administrative County of London if so required by such distributors with any authorized undertakers empowered to give bulk supplies; 6. "Power to incur expenditure on capital account within the limits of estimates submitted by the aforesaid Committees to the Joint Authority and approved by the Commissioners from time to time: Provided that for the purposes of s. 17 of the Electricity (Supply) Act, 1919, but without prejudice to the provisions of s. 1 of the Electricity (Supply) Act, 1922, the prior approval of the Commissioners shall not be required to capital expenditure not exceeding 5000*l.*"; 7. Power to incur expenditure on revenue account; 9. Powers under s. 4 of the scheme (relating to the appointment and remuneration of officers and servants) in so far as relates to the officers and servants of the Local Authority Committee and the Company Committee respectively.

The fourth annex specified the portions of the district within which the Local Authority Committee and the Company Committee respectively were to exercise and perform the powers and duties delegated to the aforesaid committees by the joint authority in accordance with the provisions of s. 9 of the scheme. Shortly, the areas of supply of thirty-nine

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local authorities as defined by the same number of Electric Lighting Orders were assigned to the Local Authority Committee, and the areas of supply of thirty-two electricity companies as defined by thirty-two other Orders were assigned to the Company Committee.

On March 12, 1923, the Electricity Commissioners opened a local inquiry into the scheme so published. Objection was taken by counsel for the relators and for a number of other companies that the scheme was ultra vires. On March 16, 1923, the relators obtained rules nisi :—

(1.) For a writ of prohibition to prohibit the Electricity Commissioners from proceeding with the further consideration of the scheme published on February 8 and from making an Order giving effect thereto, and

(2.) for a writ of certiorari directed to the said Commissioners ordering them to remove the said scheme into the King's Bench Division. The grounds for the rule in each case were that the provisions of the scheme :—

(*a*) compelling the Joint Electricity Authority at their first meeting to appoint and keep appointed two committees of the authority, and

(*b*) compelling the authority to delegate to the aforesaid two committees the powers and duties of the authority mentioned in the third annex to the scheme,

were ultra vires of the Electricity Commissioners and contrary to the provisions of the Electricity (Supply) Acts, 1919 and 1922.

On April 12, 1923, the Divisional Court (Lord Hewart C.J. and Avory and Roche JJ.), without deciding whether a writ of certiorari or prohibition would lie to the Electricity Commissioners, or whether the scheme was ultra vires or not, discharged the rules on the ground that the scheme did not become operative until it had been approved by the Minister of Transport and by a resolution of each House of Parliament, and consequently that at the present stage neither rule ought to be granted.

The relators appealed.

Talbot K.C., Tyldesley Jones K.C., W. S. Kennedy, T. R. Harker and *A. Tylor* for the appellants. The objection of the appellants is not directed to the merits of the scheme, but to its validity. Before proceeding to act in accordance with its terms they desire to be assured that it may not hereafter be declared ultra vires and void. They contend that it is ultra vires for the following reasons: By s. 6 the Act of 1919 a joint electricity authority is to be representative of authorized undertakers within the district and it may accept a transfer of the undertakings with the consent of the owners thereof. By s. 8 the joint authority must provide or secure the provision of a cheap and abundant supply of electricity within their district and for that purpose may exercise powers and duties, conferred upon them by a scheme, of constructing generating stations, main transmission lines, and other works required for the purpose, and of acquiring undertakings; and the authority may with the approval of the Commissioners establish a scheme for payment of superannuation allowances and gratuities to officers and servants who become incapable. The authority may acquire generating stations or main transmission lines or land for the purpose of any generating station. By s. 12 the authority is empowered to supply electricity within their district with certain immaterial exceptions. By s. 13 the authority may take a transfer of the undertaking of any local authority. By s. 15 it may be authorized to abstract water from rivers and canals. By s. 1 of the Electricity (Supply) Act, 1922, it may with the consent and subject to the regulations therein mentioned borrow money for the purpose of paying for generating stations or main transmission lines or other permanent work or of providing working capital, and any money so borrowed may be charged on the undertaking and revenues of the joint authority. By s. 3 a joint authority may be authorized to issue stock to be charged on its undertaking and revenues. By s. 10 a joint authority may dispose of works or property no longer required. Other powers and duties are conferred and imposed by these statutes upon joint electricity authorities; but enough has been said to

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show that wide powers have been indicated by the Legislature as exercisable by joint bodies representative of the authorized undertakers, whether companies or local authorities, in their districts. The scheme does not carry out, on the contrary it obviates, the intention of the Legislature. By s. 7, sub-s. 1, the first act of the joint authority is to put itself out of action, to constitute two separate authorities instead of one joint authority; and its second act is by s. 9, sub-s. 1, to delegate to these separate authorities, or committees as they are called, the powers specified in the third annex to the scheme; so that if the local authority undertakers in a district are minded to incur a capital expenditure, the company undertakers in the district are to have no voice in the matter; and the local authority undertakers will no longer have any concern in the remuneration the company undertakers allow their officers and servants; whereas by the Act of 1919 both sets of undertakers are entitled to have a voice in each of these matters. By s. 39 of the scheme it shall be the duty of the joint authority to provide all sums of money required for the purpose of meeting such capital expenditure as is approved by the Commissioners. By s. 43 the joint authority shall allocate all moneys borrowed or raised by them to meet the requirements of the Local Authority Committee or the Company Committee to those committees respectively. By s. 45 all moneys arising from the disposal of lands acquired by the joint authority for the purpose of the scheme and all other capital moneys received by them in respect of their undertaking shall be applied in the reduction of the capital moneys borrowed or raised by them. By s. 46, save as thereinbefore provided, all moneys received by the joint authority in respect of their undertaking shall be applied by them in manner in the order following:—(*a*) in payment of the working and establishment expenses; (*b*) in payment of any pensions or gratuities granted under any scheme established under s. 8 of the Act of 1919; (*c*) in payment of the interest or dividend on any stock or other securities issued by the joint authority in respect of money borrowed; (*d*) in providing any instalments

or sinking fund required to be provided in respect of money borrowed. In short the scheme provides for a complete financial separation between the Company Committee and the Local Authority Committee.

The Divisional Court only decided that at this stage the application for the writs was premature. That decision would prevent the validity of a scheme or order embodying a scheme from ever being questioned until it had become a statutory enactment, as it will when approved by a resolution of each House of Parliament: *Institute of Patent Agents* v. *Lockwood.* (1) Each House will assume that the Commissioners have acted within their powers, and so the legality of the scheme will never be called in question. And surely if a body is acting ultra vires a writ of prohibition cannot be applied for too early; it ought to be applied for at the earliest possible moment so that unnecessary expense may not be incurred.

Both certiorari and prohibition lie to a body like the Electricity Commissioners: "This Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction; and if they exceed it, to restrain them": *Rex* v. *Inhabitants in Glamorganshire.* (2) So a certiorari will lie to the Poor Law Commissioners: *Rex* v. *Poor Law Commissioners* (3); a prohibition will lie to Tithe Commissioners: *In re Ystradgunglais Commutation* (4); *In re Appledore Commutation* (5); *In re Crosby Tithes* (6); to the Commissioners of Woods and Forests: *Chabot* v. *Lord Morpeth* (7); to Inclosure Commissioners: *Church* v. *Inclosure Commissioners* (8); to Income Tax Commissioners: *Rex* v. *Clerkenwell Commissioners*

(1) [1894] A. C. 347.
(2) (1701) 1 Ld. Raym. 580.
(3) (1837) 6 Ad. & E. 1.
(4) (1844) 8 Q. B. 32.
(5) (1845) 8 Q. B. 139.
(6) (1849) 13 Q. B. 761.
(7) (1850) 15 Q. B. 446.
(8) 11 C. B. (N. S.) 664.

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of Taxes. (1) Certiorari or prohibition will lie to the Commissioners of Light Railways: *Rex* v. *Light Railway Commissioners* (2); and certiorari to licensing justices: *Rex* v. *Woodhouse* (3); to the Board of Education: *Board of Education* v. *Rice.* (4) And to put it generally, "Wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament": per Brett L.J., *Reg.* v. *Local Government Board.* (5)

The fact that the act prohibited or the order sought to be quashed is not an effective act or order until confirmed or approved by some other authority is no reason why the Court should hold its hand. In *In re Crosby Tithes* (6) a prohibition issued against the Commissioners of Tithes prohibiting them from making an award, although the award had no effect until it had been confirmed by the Commissioners after hearing any objections thereto. In *Church* v. *Inclosure Commissioners* (7) a prohibition issued to prohibit the Inclosure Commissioners from acting on the report of an assistant Commissioner under s. 27 of the Inclosure Act, 1845, and from certifying that the inclosure of part of a common would be expedient, although their certificate had no operation without the sanction of Parliament. Orders of the Light Railway Commissioners are provisional only and have no effect till confirmed by the Board of Trade as provided by the Light Railways Act, 1896. Yet prohibition and certiorari lie to the Light Railway Commissioners if their orders are irregular: *Rex* v. *Light Railway Commissioners.* (2)

The Divisional Court relied upon *Reg.* v. *Hastings Local Board* (8), where it was held that a certiorari would not lie to bring up a provisional order of the Secretary of State

(1) [1901] 2 K. B. 879.
(2) [1915] 3 K. B. 536.
(3) [1906] 2 K. B. 501.
(4) [1911] A. C. 179.
(5) (1882) 10 Q. B. D. 309, 321.
(6) (1849) 13 Q. B. 761.
(7) 11 C. B. (N. S.) 664.
(8) 6 B. & S. 401.

empowering the local board to put in force the compulsory powers of the Lands Clauses Consolidation Act, 1845, as having been made without jurisdiction. That decision can only be supported, if at all, on the ground that the Local Government Act, 1858, under which the provisional order was made, provided that the order should "be of no validity" unless confirmed by Act of Parliament; and that, whatever may be said of a prohibition, a certiorari would not lie to bring up an order which was "of no validity." The provisional order in that case was regarded as a stage in legislation, and not as a judicial act.

[*Reg.* v. *London County Council* (1) was also cited.]

Sir Douglas Hogg A.-G., *Macmorran K.C.* and *Bowstead* for the respondents. The scheme is within the powers which may be conferred on a joint electricity authority by s. 6, sub-s. 2, of the Act of 1919. The power of delegation is very extensive, "with or without restrictions."

But even if the respondents were conferring greater powers than authorized by the Act, the Court has no jurisdiction to entertain these applications. To found an application for a prohibition it must be shown that the persons sought to be prohibited are a body of persons who claim to exercise judicial powers and profess to do acts judicially determining rights or imposing obligations. The same applies to certiorari, with the addition that the body in question must have made an order.

"The writ of prohibition is a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it is not legally vested or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." (2) This passage, which was cited with approval by Lord Cave L.C. in *In re Clifford and O'Sullivan* (3), defines the scope of the writ of prohibition in terms

(1) [1893] 2 Q. B. 454.
(2) Short and Mellor, Practice of the Crown Office, 2nd ed. (1908), p. 252.
(3) [1921] 2 A. C. 570, 582.

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much more restricted than those of Brett L.J. in *Reg.* v. *Local Government Board* (1) in the passage cited by the appellants. In *In re Clifford and O'Sullivan* (2) the Lord Chancellor referred to a number of cases in support of the rule that the writ only lies to bodies exercising judicial functions, but does not lie to bodies charged with the duty of inquiring and advising. For examples, in *Rex* v. *Inhabitants in Glamorganshire* (3) justices authorizing a rate for the repair of a bridge were acting judicially; so were the Tithe Commissioners in *In re Crosby Tithes* (4) in certifying that a proposed inclosure of common land would be expedient; and the duties of the licensing justices in *Rex* v. *Woodhouse* (5) were also judicial. The order of the respondents in this case is not a judicial act. It binds no one. It is merely a stage in legislation, a method of furnishing information upon which the Legislature may or may not act after it has been considered by the Minister of Transport. In these circumstances the Courts of Law will not interfere, for that would be to trespass on the domain of the Legislature: *Reg.* v. *Hastings Local Board.* (6) That case has been followed in Ireland in *Ex parte Kingstown Commissioners* (7), and in Scotland in *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners.* (8) In the latter case the National Insurance Act, 1911, having authorized the Insurance Commissioners to make regulations for carrying into effect Part I. of the Act, and having provided that the regulations should be laid before both Houses of Parliament and should have effect as if enacted in the Act unless annulled by His Majesty in Council on an address presented by either House; it was held that regulations made by the Commissioners but not yet laid before Parliament could not be challenged by an action of interdict (the Scottish equivalent of a prohibition) as being ultra vires provided they dealt with matters within the scope of Part I. of the Act. That case is indistinguishable from

(1) 10 Q. B. D. 309, 321.
(2) [1921] 2 A. C. 570.
(3) 1 Ld. Raym. 580.
(4) 13 Q. B. 761.
(5) [1906] 2 K. B. 501.
(6) 6 B. & S. 401.
(7) (1885) 16 L. R. Ir. 150; (1886) 18 ibid. 509.
(8) 1915 S. C. 504.

the present. The attention of the Court in *Rex* v. *Board of Trade* (1) was not directed to the crucial difference between advisory and judicial orders.

Talbot K.C. in reply. *Reg.* v. *Hastings Local Board* (2) and the cases which followed it are inconsistent with *Church* v. *Inclosure Commissioners.* (3) If it be true to say that the order of the Secretary of State in the *Hastings Case* (2) was merely advisory and not judicial, it is certainly not true to say the same of the order of the respondents in this case.

Cur. adv. vult.

July 27. The following written judgments were delivered.

BANKES L.J. These appeals are from two orders of the Divisional Court discharging two rules nisi, one for certiorari and the other for prohibition, obtained at the instance of the London Electricity Joint Committee (1920) Ld., and directed to the Electricity Commissioners. The object of the application was to test the validity of a proposed scheme published by the Commissioners on or about February 8, 1923, for effecting an improvement of the existing organization for the supply of electricity in the London and Home Counties Electricity District. The Electricity Commissioners are a statutory body set up by the Electricity (Supply) Act, 1919, as the authority to whom a reorganization of supply of electricity is entrusted. The Act contemplates the division of England, Scotland and Wales, or parts of them, into separate electricity districts with joint electricity authorities who are to exercise full powers within their respective districts. The Electricity Commissioners are the authority to approve, or to themselves formulate schemes for the formation of electricity districts, and the setting up of joint electricity authorities. Sect. 7 of the statute provides as follows: "(1.) The Electricity Commissioners may make an order giving effect to the schemes embodying decisions they arrive at as the result of such inquiry as aforesaid, and present the

(1) [1915] 3 K. B. 536. (2) 6 B. & S. 401.
(3) 11 C. B. (N. S.) 664.

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order for confirmation by the Board of Trade, who may confirm the order either without modification or subject to such modifications as they think fit. (2.) Any such order shall be laid, as soon as may be after it is confirmed before each House of Parliament, but shall not come into operation unless and until it has been approved either with or without modification by a resolution passed by each such House, and when so approved shall have effect as if enacted in this Act."

The scheme to which objection is taken appears at the present stage of its existence as a "Draft Order under s. 7 of the Electricity (Supply) Act, 1919, constituting the London and Home Counties Electricity District, and establishing and incorporating the London and Home Counties Joint Electricity Authority." The objection to this draft order is that the Electricity Commissioners are travelling outside their parliamentary powers, and are acting without jurisdiction in putting forward for adoption this scheme in its present form. Whether there are any good and sufficient reasons from the point of view of the business interests of the objectors for taking the objection it is not for this Court to determine. The materials upon which to form any opinion upon that question are not before us. The only question on this part of the case is whether the objection as to want of jurisdiction is made out. In my opinion it is, and on this short ground: Sects. 5 and 6 of the Act of 1919 enable the Electricity Commissioners to formulate, or to approve schemes, which contain provisions enabling the joint electricity authority to delegate to committees of the authority any powers of the authority. In order to get over objections made by the London County Council to having more than one district, and more than one electricity authority for the London and Home Counties, and the objections of the authorized undertakers within the district to having only one, the Electricity Commissioners have propounded this scheme, which, while in name providing for one electricity authority, and one district, in fact provides for two. The way in which this is proposed to be done is this: The scheme provides for the creation of a joint electricity authority under the name of the London and Home Counties Joint

Electricity Authority. It then provides that the joint committee at their first meeting shall appoint two committees of the joint committee, one to be called the Local Authority Committee, the other the Company Committee. In order to create the two authorities under the one name the scheme goes on to provide (cl. 9) that the joint authority shall delegate to the Local Authority Committee, and to the Company Committee respectively, such of the powers and duties of the joint authority as are specified in the third annex to the scheme, and it assigns to each committee a separate portion of the joint electricity district. The effect of this provision is to set up within the one joint electricity district, which the scheme purports to create, two joint electricity authorities, each with its separate district, and its independent powers. This is not, in my opinion, authorized by the Act of 1919.

A further objection to the validity of the proposed scheme is that the power of delegation which, by the statute, may be vested by a scheme in a joint electricity authority, is, by this scheme, exercised by the Electricity Commissioners themselves. My view of the construction of the Act of 1919 on this point is that the Electricity Commissioners have the statutory right of determining whether a power of delegation to committees shall be conferred by a scheme upon a joint electricity authority, and that the statutory right of exercising that power, if conferred, is vested in the joint authority alone. Without going into other questions I am of opinion that upon the grounds I have mentioned the scheme proposed by the Electricity Commissioners is, to some extent, ultra vires. On the point raised as to the effect of s. 26 of the Act of 1919, it is sufficient to say that I do not think that the section can be read as giving the Electricity Commissioners wider powers on the particular matters which I have dealt with than those conferred upon them by the Act itself.

The important part of the appeal has reference to the jurisdiction of the Court to make any order either for prohibition or certiorari. The first objection taken was that any application was premature, the matter being still only

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in its opening stage. The Commissioners, it was said, have decided nothing, they have merely published the scheme preparatory to holding the local inquiry thereon which they are directed by s. 5, sub-s. 4, of the Act of 1919 to hold before making any order. This objection may be a valid objection to the granting of a writ of certiorari, but as it is not necessary to decide the point I express no opinion upon it. With regard to prohibition, if the writ lies at all I do not think that the objection is a sound one. The point was raised in the case of *Byerley* v. *Windus.* (1) Bayley J. deals with it in this way. He says: "And this brings me to the second question, whether the proceedings are in such a state in the Court below as to warrant a prohibition at present"; and he proceeds: "But when once it appears by the proceedings in the spiritual court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the Courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once; and it was upon this principle that the prohibitions were granted in *Darby* v. *Cosens* (2) and in *French* v. *Trask.*" (3) The statement of what occurred at the local inquiry, as set out in para. 15 of Mr. Fladgate's affidavit (4), brings this case, in my opinion, well within the principle laid down by Bayley J., and I think that this objection fails.

The other objections to the granting of any writ were much more serious, and they raise difficult and important questions, constitutional as well as legal. In substance, the objections come to this: (*a*) that the proceedings of the Electricity Commissioners are of an executive, and not a judicial, character; (*b*) that whether that be so or not, their proceedings in reference to the preparation of schemes, as directed

(1) (1826) 5 B. & C. 1, 21.
(2) (1787) 1 T. R. 552.
(3) (1808) 10 East, 348.
(4) This paragraph stated that the Electricity Commissioners at the local inquiry invited discussion of the scheme on the assumption that it was intra vires, but that counsel for the companies objected to this course and the inquiry was thereupon adjourned.

by the Electricity Act, 1919, are controllable by Parliament, and by Parliament alone, and are such that there is no moment of time at which the Court can intervene to inquire whether the proceedings are ultra vires or not. The argument on this second contention is presented in the following way: Sect. 7 of the Act, it is said, provides that the Commissioners may make an order giving effect to a scheme, but that order has no force or effect in itself. It is merely a suggestion or advice to be passed on to the Minister of Transport, who may confirm or modify the scheme. Even then the order has no force. It must first be approved by resolution passed by each House of Parliament, and then, and not till then, has the order any force or effect. As soon as the order has been approved by both Houses of Parliament the section provides that it shall have effect as if enacted in the Act. The result, according to the respondents, is that any application to the Courts for a writ of prohibition or certiorari must be either premature or too late; premature if made before the order of the Commissioners becomes an Act of Parliament, too late if made after it has attained that status. This argument has only become possible since the Legislature has adopted the practice of providing that resolutions or orders which are directed to lie on the table for a certain period before becoming effective, or which have to be approved by resolution of the Houses of Parliament, are, when approved, to have effect as if they were themselves Acts of Parliament. The effect of legislation in this form was discussed in the case of *Institute of Patent Agents* v. *Lockwood* (1), where Lord Watson concludes his speech by saying: "Such rules are to be as effectual as if they were part of the statute itself." The effect of accepting the argument of the Attorney-General on this point would be very far reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is adopted, to come to a Court of law and demand an inquiry whether the action, or decision, of which he is complaining is ultra vires or not. I question very much whether Parliament had

(1) [1894] A. C. 347, 365.

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any deliberate intention of producing this result by adopting this particular form of legislation.

I pass now to consider the contention that if the Court makes an order in the present case for the issue of a writ of prohibition it will be trespassing on ground reserved by Parliament to itself. I cannot see why this action of the Court should be so regarded. By the Act of 1919 Parliament laid down the limits of the jurisdiction of the Electricity Commissioners. It did so presumably because it considered that those limits were the proper ones, and the ones which the Commissioners should observe. Why should Parliament object to a Court of law, if appealed to, using its powers to keep the Commissioners within those limits? Parliament no doubt has, as between itself and the Commissioners, provided that no order of the Commissioners shall have effect unless first approved by Parliament. This reservation must, I consider, be treated as a reservation for the purposes of control, and does not in my opinion exclude the jurisdiction of the Courts of law. If any decision of a Court of law in the opinion of Parliament unduly fetters the action of the Commissioners it is always open to Parliament to extend the limits of that jurisdiction.

I have so far only dealt in a general way with the arguments addressed to the Court by the Attorney-General. The real question is whether the principles already laid down in reference to the power and duty of the Courts to issue writs of prohibition apply to the present case. There can, of course, be no exact precedent, as the Electricity Commissioners are a body of quite recent creation. It has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances. A study of the decisions of the Courts in relation to writs of prohibition illustrates how true this is. In the case of *In re Clifford and O'Sullivan* (1) the Lord Chancellor quotes with approval the description of a writ of prohibition given in Short and Mellor (2) as "a judicial writ, issuing out of a Court of superior jurisdiction

(1) [1921] 2 A. C. 570, 582. (2) 2nd ed. (1908), p. 252.

and directed to an inferior Court for the purpose of preventing the inferior from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction." Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word "Court." As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of this in the books, commencing in quite early times. In the case of *Rex* v. *Inhabitants in Glamorganshire* (1), the Court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament, and if under pretence of such an Act they proceeded to encroach jurisdiction to themselves greater than the Act warrants the Court could send a certiorari to them to have their proceedings returned to the Court, to the end that the Court might see that they keep themselves within their jurisdiction, and if they exceed it to restrain them. It would appear from the judgments in *In re Ystradgunlais Commutation* (2) and *In re Appledore Commutation* (3) that in both those cases the Court was willing to assume that a writ of prohibition would lie against the Tithe Commissioners. In *Chabot* v. *Lord Morpeth* (4) the Court certainly proceeded upon the assumption that a writ of prohibition might be issued to the Commissioners of Woods and Forests. The same was the case in *Rex* v. *Clerkenwell Commissioners of Taxes* (5) in reference to those Commissioners. In the cases of *In re Hall* (6) and of *Rex* v. *Light Railway Commissioners* (7) writs were ordered to be issued to the Comptroller-General of Patents, and to the Light Railway Commissioners respectively. In *Board of Education* v. *Rice* (8) a writ of certiorari was directed to the Board of Education. In *Reg.* v. *London County Council* (9)

(1) 1 Ld. Raym. 580.
(2) 8 Q. B. 32.
(3) 8 Q. B. 139.
(4) 15 Q. B. 446.
(5) [1901] 2 K. B. 879.
(6) (1888) 21 Q. B. D. 137.
(7) [1915] 3 K. B. 536.
(8) [1911] A. C. 179.
(9) [1893] 2 Q. B. 454.

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this Court doubted, but did not decide, whether prohibition would lie against the County Council. Kay L.J. expressed his doubt as being whether the County Council would be exercising any judicial function in determining whether a churchyard, which is now disused, shall be considered as part of one parish or another parish. In *In re Grosvenor Hotel Co.* (1) the Court refused to issue a writ of prohibition to the Board of Trade and to their inspector, upon the ground that the examination and report of an inspector under s. 56 of the Companies Act, 1882, was not a judicial proceeding in any proper sense of the term. These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. There are, I think, three dicta of learned judges which may usefully be borne in mind in approaching an examination of the decisions which bear most closely upon the present case. There is the dictum of Brett L.J., as he then was, in *Reg.* v. *Local Government Board* (2) where he says: "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." There is the dictum of Lord Sumner in *In re Clifford and O'Sullivan* (3), where he says: "It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all." Lastly there is the dictum of Fletcher Moulton L.J. in *Rex* v. *Woodhouse* (4), where he is discussing what, in his opinion, constitutes a judicial act. He there says: "Other instances could

(1) (1897) 76 L. T. 337.
(2) 10 Q. B. D. 309, 321.
(3) [1921] 2 A. C. 570, 589.
(4) [1906] 2 K. B. 501, 535.

be given, but these suffice to show that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law." In that case the Lord Justice was dealing with an application for a writ of certiorari, but his observations here quoted apply in my opinion equally to prohibition. The authorities which require a close consideration are in order of date: *In re Crosby Tithes* (1); *Church* v. *Inclosure Commissioners* (2); *Reg.* v. *Hastings Local Board* (3); *In re Local Government Board; Ex parte Kingstown Commissioners* (4): *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners.* (5) In the first of these cases a rule was made absolute for a writ of prohibition directed to the Tithe Commissioners of England, and to one of the Assistant Tithe Commissioners, prohibiting them from making their award as to the tithes of a parish until the decision of a suit then pending in the Court of Chancery. The application was based on the provisions of s. 50 of the Tithe Act of 1836, which directs that when all the suits and differences referred in the section have been decided the Commissioners or Assistant Commissioner shall proceed to frame the draft of an award. This draft cannot become effective until after the opportunity has been given for dealing with objections to its provisions, and until the Commissioners themselves have finally approved it. The application for prohibition was made because the Assistant Commissioner refused to stay his hand in framing the draft of his award until after

(1) 13 Q. B. 761.
(2) 11 C. B. (N. S.) 664.
(3) 6 B. & S. 401.
(4) 16 L. R. Ir. 150; 18 ibid. 509.
(5) 1915 S. C. 504.

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the suit had been determined. In that case the Court saw no objection to the issue of the writ, although the matter was only in an initial stage, and no draft of an award had been made. The case of *Church* v. *Inclosure Commissioners* (1) is the one which requires the closest consideration of any of the cases cited during the argument. It was a case in which the Court granted a writ of prohibition directed to the Inclosure Commissioners prohibiting them from reporting the proposed inclosure of a certain common for the sanction of Parliament, or from taking any further steps towards the inclosure of the said common without first obtaining the consent of the complainant. In order to realize the importance of the decision it is necessary to call attention to the material provisions of the Inclosure Act of 1845 in reference to the procedure to be followed. It appears from the provisions of s. 27 that some lands might be inclosed by order of the Commissioners without the previous consent of Parliament, and some might not. The common in question in this case was one that could not be inclosed without the previous direction of Parliament. The course to be followed to secure inclosure in this case therefore was first the report of the Assistant Commissioner to the Commissioners, followed by their report to Parliament, in which they certify their opinion as to the expediency of the proposed inclosure, which report Parliament might or might not adopt, or which Parliament could alter or vary, and which as adopted is included in an Act of Parliament. The objection on which the application to the Court was made was that the Assistant Commissioner refused to consider a claim which was properly brought to his attention. Objection was made to the Court making the rule absolute on very much the same grounds as are advanced by the Attorney-General in the present case. It was argued that the matter was not the subject of prohibition, as the question was left by the statute to the Commissioners, who if satisfied then made a provisional order which after hearing objections they reported to Parliament,

(1) 11 C. B. (N. S.) 664.

who might or might not act upon it. In its essential features this case appears to me undistinguishable from the case with which the Court is dealing. Reliance was placed by the Attorney-General upon the decision in *Reg.* v. *Hastings Local Board.* (1) If I could take the same view of the position of the Electricity Commissioners under the Act of 1919 as was taken by the Court in that case of the position of the Secretary of State under the Local Government Act, 1858, I should consider that case a guide as to what course this Court should adopt in the present appeal. It is only necessary to refer to the reasons which led Mellor J. to take the view upon which he acted to see what a very different case the present one is from that. I cannot look upon it either as a guide or as an authority. The case in the Irish Courts of *In re Local Government Board; Ex parte Kingstown Commissioners* (2) requires serious consideration. If the view of Palles C.B. is to be accepted, that the proceedings of the Local Government Board which were questioned in that case were neither ministerial nor judicial but "quasi legislative—that is, a proceeding towards legislation," the decision goes far to support the argument of the Attorney-General. In the Court of Appeal this view was not the one upon which the Court acted. Much that was said by Fitzgibbon L.J. is in favour of the argument of the appellants. The Scotch case of the *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners* (3) needs consideration. By s. 65 of the National Insurance Act, 1911, the Insurance Commissioners are empowered to make regulations which must be laid before both Houses of Parliament as soon as may be after they are made, and which are to have effect as if enacted in the Act. The Insurance Commissioners had made regulations the validity of which was challenged, and application was made to the Court to restrain the Commissioners from proceeding to lay the regulations before Parliament. The Lord Ordinary granted the application. On appeal his decision was reversed by a majority of the Court, who laid stress on the special

(1) 6 B. & S. 401.

(2) 16 L. R. Ir. 150; 18 ibid. 509.

(3) 1915 S. C. 504.

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provision of the statute in reference to the regulations having the force of statute law.

The conclusion I have come to in reference to the whole matter is that there is abundant precedent for the Court taking action at the present stage of the proceedings of the Electricity Commissioners, provided it is satisfied that the Commissioners are proceeding judicially in making their report, even though that report needs the confirmation of the Minister of Transport and of both Houses of Parliament before it becomes effective. In coming to a conclusion on this latter point it is necessary to deal with this case on its own particular circumstances. The Electricity Act of 1919 imposes upon the Electricity Commissioners very wide and very responsible duties and powers in reference to the approval or formulation of schemes. At every stage they are required to hold local inquiries for the purpose of giving interested parties the opportunity of being heard. Their authority extends to the creation of bodies who may exercise all or any of the powers of the authorized undertakers within the electricity district, and to whom the undertakings themselves may be transferred on terms settled by the Commissioners. On principle and on authority it is in my opinion open to this Court to hold, and I consider that it should hold, that powers so far reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely, to use the language of Palles C.B., as proceedings towards legislation. On these grounds I consider that the appeal against the order of the Divisional Court discharging the rule nisi for a prohibition must be allowed with costs here and below, and the rule for prohibition in the terms of the rule nisi must be made absolute. The appeal against the order refusing to make the rule nisi for a certiorari absolute is dismissed without costs.

ATKIN L.J. This is an appeal from orders of the Divisional Court discharging rules for writs of prohibition and certiorari addressed to the Electricity Commissioners. The rules were obtained for the purpose of preventing the Commissioners

from proceeding with a scheme published by the Commissioners in February, 1923, under the Electricity Supply Acts, 1919–1922, providing for the appointment of a joint electricity authority in the London area defined in the scheme. The objection taken to the scheme is that it is beyond the powers of the Commissioners. The Divisional Court have not decided this point, but discharged the rules on the ground that at the present stage of the proceedings of the Commissioners there should not be prohibition or certiorari. It appears to me to be necessary to decide what the Commissioners' powers are, and whether the proposed scheme is within those powers, before deciding whether the stage at which prohibition should be granted has been reached. Indeed if the Commissioners are a body to whom prohibition will lie, and are in fact purporting to exercise a jurisdiction which they do not possess, I find it difficult to see how prohibition can be applied for at too early a stage. This, however, must be considered later.

The Electricity Commissioners are a body constituted by the Electricity (Supply) Act, 1919. By s. 1, sub-s. 1, "For promoting, regulating, and supervising the supply of electricity there shall be established as soon as may be after the passing of this Act, a body to be called the Electricity Commissioners, who shall have such powers and duties as are conferred on them by or under this Act, and, subject thereto, shall act under the general directions" of the Minister of Transport. By s. 1, sub-s. 2, the Commissioners, not exceeding five in number, are to be appointed by the Minister of Transport. It will be seen therefore that the Commissioners are not a representative body: they are appointed by a Government department, their powers and duties are expressly limited to those conferred by or under the Act, and subject thereto, which I take to mean within the limits of such powers and duties, they are to act under the general directions of the department that appoints them. By the remaining sections of the Act they are given very considerable powers for the purpose of organizing the supply of electricity throughout the country. The Act is divided into

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groups of sections headed "Reorganization of Supply of Electricity," ss. 5 to 8; "Generating stations," ss. 9 to 11; "Powers of Joint Electricity Authorities," ss. 12 to 17; "Transitory Provisions," ss. 18 and 19; "Amendments of Electric Lighting Acts," ss. 20 to 27; "Financial Provisions," ss. 28 to 30; and "General," ss. 31 to 40. They have power to constitute and incorporate joint electricity authorities within areas defined by the Commissioners, to provide for the exercise by such authorities of any of the powers of authorized undertakers within the district, and for the transfer to such authorities of the undertakings of any of those undertakers. By s. 11 no new generating station may be established or existing generating station extended without their consent. By s. 13 they may transfer to a joint electricity authority any right existing in a local authority to purchase the undertaking of an authorized distributor. By s. 15 they may make representations to the Board of Trade on which the Board of Trade may by order give a joint electricity authority or an authorized undertaking rights of taking water. And by s. 19, before the establishment of a joint electricity authority the Commissioners may require authorized undertakers to render mutual assistance to one another in respect of giving and distributing supplies of electricity, the management and working of generating stations, and the provision of capital for the purpose of such assistance. By s. 26 "Anything which under the Electric Lighting Acts may be effected by a provisional order confirmed by Parliament may be effected by a special order made by the Electricity Commissioners and confirmed by" the Minister of Transport, or by an order establishing a joint electricity authority under the Act, provided that such special order be approved by a resolution passed by each House of Parliament. By s. 33 the Commissioners have powers to hold inquiries and by order to require any person to attend and give evidence on oath, and produce documents at the inquiry, and any person failing to comply with such order is liable on conviction to a fine not exceeding 5*l*. Further powers are given by the Electricity (Supply) Act,

1922, of which I need only notice the power to suspend the powers of a joint authority or local authority to purchase an undertaking, but only with the consent of the authority in whom the right to purchase is vested. These are considerable powers, but there are corresponding considerable restrictions. The Commissioners may not define an electricity district, should there be any objection, without holding an inquiry, nor may they approve or publish a scheme for improving an electricity district without holding a local inquiry, nor make an order embodying the scheme without such an inquiry. The joint electricity authority is to be representative of authorized undertakers within the district, and no scheme is to provide for transfer to the joint electricity authority of any part of an undertaking except with the consent of the owners thereof: s. 6 of the Act of 1919. By s. 12 the joint electricity authority have power to supply electricity within their district, but not in the area of supply of an authorized distributor or of a power company without their consent, with certain exceptions, subject to provisoes for appeal to the Electricity Commissioners. By s. 13 the powers of transfer to a joint authority of a local authority's rights of purchase can only be conferred on a joint authority on which the local authority is adequately represented. There are other limiting provisions as to consents and agreements which it is unnecessary to detail. The effect of the Act is to give the Commissioners power to act within limits, wide indeed but strictly defined by statute, and designed to give a large measure of protection to rights already vested in undertakers and private persons.

The question now immediately at issue is the validity of a scheme for the constitution of a joint electricity authority for the London and Home Counties Electricity District as defined in the scheme. The scheme is published by the Commissioners pursuant to s. 5, sub-s. 4, of the Act of 1919, and the Commissioners have given notice of and commenced to hold an inquiry thereon in pursuance of the said subsection. The scheme by s. 2 of the schedule constitutes and incorporates a joint electricity authority for the district

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representative of the authorized undertakers within the district, and also of local authorities and large consumers of electricity within the district, giving eight representatives to local authority undertakers, six to company undertakers within the County of London, one to company undertakers outside the County of London, one to power companies, six to the London County Council, three to six other county councils, and two to the Railway Companies' Association. But the scheme also provides by s. 7, sub-s. 1, that the joint authority shall appoint and keep appointed two committees of the joint authority—namely, a committee of local authority undertakers consisting of the eight members appointed by the local authority undertakers, and a committee of company undertakers consisting of the six members appointed by company undertakers within the County of London; and by s. 9, sub-s. 1, provides that the joint authority shall delegate to the two respective committees the powers and duties mentioned in the third annex to the scheme, which powers and duties shall continue to be exercised and performed by such committees within their respective areas until the event mentioned in the section. The powers and duties mentioned in the annex include powers and duties relating to the generation and transmission of electricity and to the supply of electricity in bulk to authorized distributors, and include powers to incur expenditure on capital account within the limits of estimates submitted to the joint authority and approved by the Commissioners. The scheme by s. 9, sub-s. 3, provides that the two committees shall exercise and perform any delegated power or duty in the name and on behalf of the joint authority in like manner as the joint authority could have exercised or performed such power or duty if the said power or duty had not been delegated to the committees. There is no dispute, and indeed it is of the essence of the scheme, that by the above provisions the powers and duties in question are for the specified period taken away from the joint authority and confided to the committees without any power of resumption by the joint authority.

These provisions appear to me a plain violation of the

provisions of the Act of 1919. The joint authority in whom powers are vested under the Act is to be joint and representative. It must be representative of authorized undertakers within the district (which I take to mean all authorized undertakers), and it may also, if the Commissioners think fit, be representative of local authorities and large consumers. In the present case the Commissioners have decided that the joint authority should be representative of both these classes. It is to such a body, joint and representative, that the statute has confided such powers and duties as it gives direct to a joint authority, and that the Commissioners are empowered to confide such powers and duties as they have authority to give. The two committees to whom the powers in question are given under the scheme are neither joint nor representative, either in their constitution or by inheritance from those who in fact appoint them. In truth and in fact the joint authority are never intended to possess or exercise the powers which they are said to delegate, and they have no voice in the selection of the committees. It is but a play upon words to style the two bodies committees of the joint authority. They are in fact in respect of their powers separate authorities independent for the most part of the joint authority and operating each in its own district.

It was sought to justify the provisions by reference to s. 6, sub-s. 2, of the Act, which enacts that the scheme may provide for enabling the joint authority to delegate with or without restrictions to committees of the authority any of the powers or duties of the authority. It is difficult to imagine two things more different than enabling a representative body to delegate powers and duties to a committee of its own choosing and compelling the representative body to transfer from itself to a named few of its constituent members such powers and duties. If the enabling power alone had been exercised it seems to me impossible to suppose that the authority so enabled could divest itself of the powers in question without control or power of resumption.

It was further sought to justify the provisions by reference to s. 26 of the Act. Anything which can be done by

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provisional order under the Electric Lighting Acts can be done by an order establishing a joint electricity authority, which this is. By the joint effect of s. 3, sub-s. 8, and s. 4 of the Electric Lighting Act, 1882, a provisional order may contain such regulations and conditions as the Board of Trade—now the Minister of Transport—may think expedient, and therefore the Electricity Commissioners may put into their order constituting the authority any regulations and conditions they may think expedient. The answer seems to be first that the granting and imposing of these powers and duties are not things which could be effected under the Electric Lighting Acts by provisional order, for these orders relate to powers to supply electricity which in the case of joint electricity authorities are specially provided for under special conditions by s. 12 of the Act of 1919; and, secondly, that the regulations and conditions mentioned in s. 3, sub-s. 8, of the Act of 1882 are clearly regulations and conditions ancillary to the principal object of the licence or order mentioned, and in any case could not include conditions in contravention of the express statutory checks and restrictions imposed by the principal Act of 1919. I think that it is proved by the affidavits and exhibits in this case that the Commissioners consider this provision as to the two committees an essential part of their scheme, and that they determined to hold their inquiry into the scheme after hearing counsel on the point of its invalidity.

The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary,

to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. Thus certiorari lies to justices of the peace of a county in respect of a statutory duty to fix a rate for the repair of a county bridge: *Rex* v. *Inhabitants in Glamorganshire* (1); and to Poor Law Commissioners acting under the Poor Law Amendment Act, 1834, in prescribing the constitution of a board of guardians in a parish where there was an existing poor law authority: *Rex* v. *Poor Law Commissioners.* (2) In that case it may be noted that the Attorney-General had obtained a rule for a mandamus to the new board of guardians to obey the order of the Commissioners, and Sir Frederick Pollock subsequently obtained a rule for a certiorari to bring up the order to be quashed; and by agreement the question was argued on the rule for a certiorari. So certiorari has gone to the Board of Education to bring up and quash their determination under s. 7, sub-s. 3, of the Education Act, 1902, on a question arising between the local education authority and the managers of a non-provided school: *Board of Education* v. *Rice.* (3) Also to justices acting under the Licensing Act, and not in the strict sense as a court: *Rex* v. *Woodhouse.* (4) Similarly prohibition has gone to the Tithe Commissioners, and an assistant Tithe Commissioner, to prevent them from making an award as to the tithes in a particular parish: *In re Crosby Tithes* (5), and to the Inclosure

(1) 1 Ld. Raym. 580.
(2) 6 Ad. & E. 1.
(3) [1911] A. C. 179.
(4) [1906] 2 K. B. 501.
(5) 13 Q. B. 761.

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Commissioners from reporting the proposed inclosure of a common in the parish of Acton, and from taking any further step towards the inclosure of the common: *Church* v. *Inclosure Commissioners.* (1) So it has gone against the Light Railway Commissioners to restrain them from proceeding with an inquiry remitted to them by the Board of Trade after an appeal which it was held did not lie: *Rex* v. *Board of Trade.* (2) Here the right to prohibition was not raised by counsel, as a decision was desired on the point as to the validity of the appeal, but the point was raised in the dissenting judgment of Phillimore L.J., and must, I think, have been present to the minds of the majority of the Court. I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction. Reference was made to the case of *In re Clifford and O'Sullivan* (3), where an attempt was made to prohibit the proceedings of so-called military courts of the Army in Ireland acting under proclamations which had placed certain Irish districts in a time of armed disturbance under martial law. Prohibition, it was held in the House of Lords, would not lie because the so-called courts were not claiming any legal authority other than the right to put down force by force, and because the so-called courts were functæ officio. I am satisfied that the observations of the Lord Chancellor in that case were directed to the first point, and that he had no intention of overruling, or indeed questioning, the long line of authority which has extended the writs in question to bodies other than those who possess legal authority to try cases, and pass judgments in the strictest sense.

In the present case the Electricity Commissioners have to decide whether they will constitute a joint authority in a

(1) 11 C. B. (N. S.) 664. (2) [1915] 3 K. B. 536.
(3) [1921] 2 A. C. 570.

district in accordance with law, and with what powers they will invest that body. The question necessarily involves the withdrawal from existing bodies of undertakers of some of their existing rights, and imposing upon them of new duties, including their subjection to the control of the new body, and new financial obligations. It also provides in the new body a person to whom may be transferred rights of purchase which at present are vested in another authority. The Commissioners are proposing to create such a new body in violation of the Act of Parliament, and are proposing to hold a possibly long and expensive inquiry into the expediency of such a scheme, in respect of which they have the power to compel representatives of the prosecutors to attend and produce papers. I think that in deciding upon the scheme, and in holding the inquiry, they are acting judicially in the sense of the authorities I have cited, and that as they are proposing to act in excess of their jurisdiction they are liable to have the writ of prohibition issued against them.

It is necessary, however, to deal with what I think was the main objection of the Attorney-General. In this case he said the Commissioners come to no decision at all. They act merely as advisers. They recommend an order embodying a scheme to the Minister of Transport, who may confirm it with or without modifications. Similarly the Minister of Transport comes to no decision. He submits the order to the Houses of Parliament, who may approve it with or without modifications. The Houses of Parliament may put anything into the order they please, whether consistent with the Act of 1919, or not. Until they have approved, nothing is decided, and in truth the whole procedure, draft scheme, inquiry, order, confirmation, approval, is only part of a process by which Parliament is expressing its will, and at no stage is subject to any control by the Courts. It is unnecessary to emphasize the constitutional importance of this contention. Given its full effect, it means that the checks and safeguards which have been imposed by Act of Parliament, including the freedom from compulsory taking, can be removed, and new and onerous and inconsistent obligations imposed without an

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Act of Parliament, and by simple resolution of both Houses of Parliament. I do not find it necessary to determine whether, on the proper construction of the statute, resolutions of the two Houses of Parliament could have the effect claimed. In the provision that the final decision of the Commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the Commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the Courts have power to keep them within those limits. It is to be noted that it is the order of the Commissioners that eventually takes effect; neither the Minister of Transport who confirms, nor the Houses of Parliament who approve, can under the statute make an order which in respect of the matters in question has any operation. I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament. The authorities are to the contrary.

In *In re Crosby Tithes* (1), where prohibition went to the Tithe Commissioners, the Assistant Commissioner, with a view to commutation of tithes, had held an inquiry into the value of certain disputed tithes, and had declared his intention of awarding a particular amount to the vicar. By the Tithe Commutation Act of 1836, s. 50, the Commissioner was not empowered to draft his award until certain pending suits were decided, and there being such a suit pending, prohibition went to the Commissioners and the Assistant Commissioner. It is to be noted that when the writ was granted the Assistant Commissioner had not even drafted his award, but had merely stated his intention so to do, and to ignore the pending suit, and that his award, when drafted, was subject to objection, and to amendment after a further hearing of such objections (s. 51), and was then subject to confirmation by the Commissioners. In *Church* v. *Inclosure Commissioners* (2), the writ of prohibition was issued to prohibit the Commissioners from

(1) 13 Q. B. 761. (2) 11 C. B. (N. S.) 664.

reporting the proposed inclosure of Old Oak Common in the parish of Acton for the sanction of Parliament, and from taking any further steps towards the inclosure of the said common, without first obtaining certain consents. An Assistant Commissioner had held an inquiry and made a report to the Commissioners, who had made a provisional order providing for inclosure. The Assistant Commissioner had wrongly estimated the values of the interests in question, which was the ground of the invalidity relied on. The inclosure in question, being within fifteen miles of the City of London, could not be made without the authority of Parliament under s. 14 of the Commons Inclosure Act, 1845. By s. 27 of the Act, in such a case, after making the provisional order, it was the duty of the Commissioners to publish it, to verify consents, and to certify in their annual report the expediency of the inclosure, and by s. 32 the provisional order would only become operative when enacted in an Act of Parliament. It is noteworthy that the Court (Erle C.J. and Vaughan Williams, Willes and Keating JJ.) thought the matter so clear that they refused the request of counsel for the Commissioners that the prosecutor should declare in prohibition to give an opportunity of questioning whether prohibition would lie in such a case. (1) I cannot distinguish that case from the present.

The case of *Reg.* v. *Hastings Local Board* (2), which was relied on by the Divisional Court, seems to me to be of little assistance. The application was for a writ of certiorari to bring up to be quashed a provisional order of the Secretary of State made pursuant to the Local Government Act of 1858, whereby the Hastings Local Board was empowered to put in force the powers of the Lands Clauses Act in respect of certain land required for widening a road. The material section expressly provided that the order of the Secretary of State should not be of any validity unless the same had been confirmed by Act of Parliament, and at the time of the application no confirming Act of Parliament had been obtained. It seems quite clear that there was no order in

(1) See 11 C. B. (N. S.) 682, note *a*. (2) 6 B. & S. 401.

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existence in respect of which certiorari could be granted, and all the judges were of opinion that the Secretary of State was in the same position as a Select Committee to whom a Bill for such a purpose might be referred. Blackburn J. stated that the order was not a judicial one. No authorities were cited to the Court. I cannot consider this case, or the Irish case cited which followed it (1), to be inconsistent with the principles on which is based the decision in *Church* v. *Inclosure Commissioners.* (2) If there were any inconsistency I prefer the authority of the latter case.

In coming to the conclusion that prohibition should go we are not in my opinion in any degree affecting, as was suggested, any of the powers of Parliament. If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the Legislature, and so far from seeking to diminish the authority of Parliament we are performing the ordinary duty of the Courts in upholding the enactments which it has passed. Nothing we do or say could in any degree affect the complete power of the Legislature by Act of Parliament to carry out the present scheme, or any other scheme. All we say is that it is not a scheme within the provisions of the Act of 1919. That it is convenient to have the point of law decided before further expense and trouble are incurred seems beyond controversy. I think therefore that the appeal should be allowed, so far as the writ of prohibition is concerned, and that the rule for the issue of the writ should be made absolute.

So far as the writ of certiorari is concerned, the matter becomes unimportant. I have considerable doubt whether there is any such definite order as could be made the subject of certiorari, and in this respect I think that the appeal should be dismissed without costs.

YOUNGER L.J. I concur so entirely in the judgment just delivered that I hesitate to add anything to it. I permit

(1) *In re Local Government Board; Ex parte Kingstown Commissioners,* 16 L. R. Ir. 150; 18 ibid. 509.

(2) 11 C. B. (N. S.) 664.

to myself the privilege of observing only upon two of the matters discussed before us. The first is this: In the proposed scheme, immediately after cl. 7, which requires the joint authority to appoint and keep appointed the Local Authority Committee and the Company Committee, and cl. 9, which *requires* the authority to delegate to these committees respectively the extensive powers of the authority set forth in the third annex to the scheme, there comes cl. 10, by which it is provided that the Local Authority Committee *may* delegate, subject to such restrictions or conditions as they may think fit, any of their powers or duties to any other committees appointed by them, with a proviso not for the moment material. I find in the contrast between this clause and clauses 7 and 9 a notable confirmation of the view we take of these two clauses. Clause 10 is the legitimate exercise by the Commissioners of their power under s. 6, sub-s. 2, of the Act of 1919 to provide by a scheme "for enabling the joint electricity authority to delegate with or without restrictions to committees of the authority any of the powers or duties of the authority," and its very presence in the scheme throws into striking relief the difficulty —the impossibility, as I think—of finding on reference to s. 6, sub-s. 2, of the Act any justification for the insertion in the scheme of such directions as are here contained in clauses 7 and 9. I feel quite satisfied that a scheme containing such clauses is not such a scheme as Parliament by the Act of 1919 empowered the Commissioners to make or formulate or the Board of Trade to confirm.

If then this Court be satisfied as it is that it has power to prohibit the Commissioners from further proceeding with such a scheme, ought it to hesitate to exercise that power in the present circumstances of this case? The Attorney-General presented to us a very weighty argument that it should—namely, that the Court, if it were now to intervene here, would be usurping the function of Parliament, which by the Act of 1919 has reserved to itself alone the privilege of expressing effective approval or disapproval of any scheme whether authorized by the Act or not, if brought before it after

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being made by the Commissioners and confirmed by the Minister of Transport. This important contention of the Attorney-General is the second matter upon which I wish to observe.

If I thought that Parliament by s. 7, sub-s. 2, of the Act of 1919 had so enacted, I would myself at once accept the contention of the Attorney-General. I would conclude that by the terms of the statute the Court had been dispensed from all responsibility in relation to the action either of the Commissioners in making, or of the Minister of Transport in confirming, any scheme under it. In such circumstances any interference by the Court at any stage would, I agree, be in the legal sense of the word an impertinence.

But I do not so read s. 7, sub-s. 2, of the Act of 1919. That Act in my judgment contemplates that the Commissioners' order, which, when approved by a resolution passed by each House of Parliament, is to have effect as if enacted in the Act, embodies only a scheme which under the Act the Commissioners are given power either to approve or formulate. Every scheme under the Act remains the scheme of the Commissioners even after it is confirmed by the Minister of Transport and approved by Parliament. The modifications in a scheme inserted either by the Minister of Transport or by Parliament are limited to modifications, as I read the Act, which might have been lawfully made under the powers of the Act by the Commissioners themselves had they been so minded. Parliament has not by the Act conferred upon the Minister of Transport, nor has it in terms reserved to itself by a mere resolution of both Houses power, under the name of modifications in a scheme of the Commissioners, to insert in a scheme provisions which would under the Act be beyond the powers of the Commissioners if inserted in the scheme by them in the first instance. So, at any rate, I read the Act. Fortunately, however, it is not necessary in this case to decide the very serious question whether, if at any time Parliament should approve by resolution of each House a scheme which, adopting if I may the language of Lord Robertson in *Russell* v.

Magistrates of Hamilton (1), could in fact be shown to be "an abuse" of the statute, the scheme so approved would nevertheless by virtue of s. 7, sub-s. 2, "have effect as if enacted in this Act," and would have to be given statutory force by every Court in which its terms were canvassed. To suggest that such a question is one which may in view of the terms of this sub-section arise, is not of course to suggest that Parliament cannot sanction and give the effect of statute law to any scheme it likes. It is only to suggest that it may not have in this Act reserved to itself the power by a mere resolution of each House to give statutory effect to a scheme the formulation of which it has not by the statute authorized. No such serious question however arises for decision now. For the moment it is, I think, enough to say that, whatever may be the effect of such a joint resolution when once it is passed, Parliament in this statute contemplates that no such resolution will approve, except possibly by inadvertence, a scheme which it would under the Act be beyond the powers of the Commissioners to formulate or of the Minister of Transport to confirm. If that be the true view of the statute the interference of the Court in such a case as this, and at this stage, so far from being even in the most diluted sense of the words a challenge to its supremacy, will be an assistance to Parliament. It will relieve each House to some extent at least from the risk of having presented to it for approval by resolution schemes which go beyond the powers committed by the statute to the Commissioners who made them or the Minister of Transport who confirmed them. It will leave each House to a great extent untrammelled by any apprehensions of this kind, to devote itself to the consideration of the question the Act has undoubtedly reserved to it—namely, whether in the particular case the scheme should be approved or not. For these reasons I am of opinion that if we have the power in this case to interfere, we are rendering a service not only to the parties concerned but to each House of Parliament itself by exercising that power as we propose to do.

(1) (1897) 25 R. 350, 357.

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BANKES L.J. So far as it relates to the prohibition the appeal will be allowed and the rule will be made absolute for a prohibition in the form of the rule nisi. So far as it relates to the certiorari the appeal will be dismissed without costs.

Appeal allowed.

Solicitors for appellants: *Sydney Morse; Ashurst, Morris, Crisp & Co.; Sherwood & Co.; Slaughter & May.*

Solicitor for respondents: *The Solicitor to the Treasury.*

W. H. G.

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[IN THE COURT OF APPEAL.]

WAKELY *v.* THE TRIUMPH CYCLE COMPANY, LIMITED.

[1923. W. 2225.]

Practice—Security for Costs—Plaintiff resident in Southern Ireland—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54)—*Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 41, *sub-s.* 1—*Irish Free State (Consequential Provisions) Act*, 1922 (13 *Geo.* 5, *Sess.* 2, *c.* 2), *s.* 1, *sub-s.* 1—*Irish Free State Constitution Act*, 1922 (13 *Geo.* 5, *Sess.* 2, *c.* 1)—*Royal Proclamation, Statutory Rules and Orders No.* 1353 *of* 1922.

A plaintiff resident in Southern Ireland and suing in this country stands in the position of a foreigner, and may be ordered to give security for costs, inasmuch as the Judgments Extension Act, 1868, ceased to operate in Southern Ireland on December 5, 1922.

APPEAL from an order of Swift J. in chambers reversing an order of the Master that the plaintiff should give security for the costs of the action.

The action was for damages for personal injuries suffered by the plaintiff near Hatfield on his way from Colchester to Chelmsford through a defect in a new motor bicycle sold to him by the defendants. The place of trial was Middlesex. The plaintiff resided at Elmshurst, Temple Gardens, in the County of Dublin in Southern Ireland. It did not appear that he had any real or personal property in this country.

The Master made an order that he should give security for costs to the amount of 25*l*. On appeal Swift J. reversed the Master's order on the ground that the provisions of the Judgment Extension Act, 1868, were still in force in Southern Ireland.

The defendants appealed.

Conway for the appellants.

Lipsett for the respondent.

BANKES L.J. This appeal raises a question of considerable practical importance. An application was made by the defendants that the plaintiff, who resides in Southern Ireland and who brought an action in this country, should be ordered to give security for costs. It is said that in the present state of legislation a person residing in Southern Ireland is in the position of a foreigner, and must be ordered to give security for costs unless he shows he has assets in this country.

The reason of the rule that a foreigner suing in this country must give security for costs is stated by Buller J. in *Pray* v. *Edie* (1), and repeated by Blackburn J. in *Raeburn* v. *Andrews*. (2) It is "that if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs." So far as the United Kingdom was concerned the rule was very considerably modified by the Judgments Extension Act, 1868, "An Act to render judgments or decrees obtained in certain Courts in England, Scotland, and Ireland respectively effectual in any other part of the United Kingdom." By s. 1, where a judgment had been obtained in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively, provision was made for registering a certificate of the judgment, and a judgment obtained in Ireland could then be enforced as if it had been obtained in England, and a judgment obtained in England could be enforced as if it had been obtained in Ireland. There are still in force similar provisions affecting Scotland. It was

(1) (1786) 1 T. R. 267. (2) (1874) L. R. 9 Q. B. 118, 120.

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pointed out in *Raeburn* v. *Andrews* (1) that after the passing of that Act it was considered unnecessary any longer to uphold the rule that a person resident in Scotland—the same applied to Ireland—and suing in this country should give security for costs. Quain J. (2) puts the matter shortly in these words: "The reason that a plaintiff resident abroad was compelled to give security for costs was because he was not in reach of our law to have process served upon him, in the event of the defendant obtaining a judgment. That reason having now ceased, the old rule is abolished." Then came the alteration introduced by the Judicature Act, 1873, and the Supreme Court of Judicature Act (Ireland), 1877, the abolition of the old Courts mentioned by name in the Judgments Extension Act, 1868, the establishment of new Courts in their place, and the application of that Act to the newly established Courts. That was done, and from that time onwards the Judgments Extension Act, 1868, applied to the Courts existing in England and till lately existing in Ireland just as it had done to the original Courts named in the statute.

So matters stood until the Government of Ireland Act, 1920. That Act contemplated the setting up of a Parliament for Southern Ireland and a Parliament for Northern Ireland, and the eventual establishment of a Parliament for the whole of Ireland. By s. 38 the existing Courts in Ireland were abolished, and in their place were established the Supreme Court of Judicature of Southern Ireland and the Supreme Court of Judicature of Northern Ireland and a Court having appellate jurisdiction throughout the whole of Ireland to be called the High Court of Appeal for Ireland. By s. 39 the Supreme Court of Judicature of Southern Ireland is to consist of two divisions, one of which, under the name of His Majesty's High Court of Justice in Southern Ireland, shall, in Southern Ireland, have and exercise all such jurisdiction as was then exercised by His Majesty's High Court of Justice in Ireland and by the judges of that Court (including the land judges), and the other of which, under the name of His Majesty's Court of Appeal in Southern Ireland, shall, in Southern

(1) L. R. 9 Q. B. 118. (2) L. R. 9 Q. B. 121.

Ireland, have and exercise all such jurisdiction as was then exercised by His Majesty's Court of Appeal in Ireland. By s. 40 similar provisions were made respecting the Supreme Court of Judicature of Northern Ireland. By s. 41, sub-s. 1, it was enacted as follows: "Subject to the provisions of this Act and any modifications and adaptations made by Irish Transfer Orders under this Act, all enactments relating to the Supreme Court of Judicature in Ireland and the judges and officers thereof shall apply to the Supreme Court of Judicature in Southern Ireland and to the Supreme Court of Judicature in Northern Ireland respectively, and the judges and officers thereof, as they apply to the Supreme Court of Judicature in Ireland and the judges and officers thereof, and as if for references to the High Court of Justice in Ireland there were substituted references to the High Court of Justice in Southern Ireland or the High Court of Justice in Northern Ireland, as the case may be, and as if for references to the Court of Appeal in Ireland there were substituted references to the Court of Appeal in Southern Ireland or the Court of Appeal in Northern Ireland, as the case may be."

It was contended that these provisions never came into force in Southern Ireland; but s. 73 seems to dispose of that argument. That section provided that the Act should come into operation on the appointed day, and that the appointed day should be a day therein specified or such other day (within certain limits) as might be fixed by Order in Council either generally or with reference to any particular provision of the Act. An Order in Council dated September 27, 1921 (No. 1527 of 1921), fixed the appointed day for the purposes of the Act relative to matters relating to the Supreme Court of Judicature in Ireland or the Supreme Court of Judicature of Southern Ireland, and October 1, 1921, was the day so fixed. Therefore on October 1, 1921, the provisions of the Judgments Extension Act, 1868, applied to the Supreme Court of Judicature of Southern Ireland.

Two other statutes remain to be considered. The first is the Irish Free State (Consequential Provisions) Act, 1922, which received the Royal Assent on December 5, 1922. By

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s. 1, sub-s. 1 : "Subject to the provisions of the First Schedule to this Act, the Government of Ireland Act, 1920, shall cease to apply to any part of Ireland other than Northern Ireland." The effect of this is that, so far as concerns Southern Ireland, the Judgments Extension Act, 1868, ceased to have any application on December 5, 1922.

Furthermore there is now no statutory provision extending or applying the provisions of that Act to the Courts of Southern Ireland. On the same day, December 5, 1922, on which the Consequential Provisions Act was passed there was also passed the Irish Free State Constitution Act, 1922. That Act recites that the House of the Parliament constituted under the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State, had passed a measure set forth in the Schedule and called the Constituent Act, and enacted that the Constitution set forth in the First Schedule to the Constituent Act should be the Constitution of the Irish Free State and should come into operation on being proclaimed by His Majesty in accordance with art. 83 of the said Constitution. As a matter of fact the coming into operation of the Constitution was proclaimed on December 6, 1922 (1), the day after the Consequential Provisions Act, 1922, received the Royal Assent.

Now art. 73 of the Constitution of the Irish Free State, referred to above, provides that "the laws in force in the Irish Free State . . . . at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended" as therein mentioned; and the question is, was the Judgments Extension Act, 1868, a law in force in the Irish Free State on December 6, 1922? The answer given by the learned judge is "Yes, it was." With all respect I think it really was not. It owed its operation in Southern Ireland to the Government of Ireland Act, 1920, and that Act had ceased to operate in Southern Ireland on December 5, 1922. The Judgments Extension Act then had ceased to

(1) Statutory Orders No. 1353 of 1922.

operate in Southern Ireland at the commencement of the present action. The plaintiff therefore stood in the place of a foreigner having no assets in this country and seeking to maintain an action here, and as he has no property in this country an order for security follows as a matter of course. The appeal must be allowed, and the order of the Master that security shall be given for 25*l.* must be restored.

ATKIN L.J. I am of the same opinion. It was laid down some forty years ago that if a plaintiff was resident in Scotland or Ireland he was not liable to find security for costs, for the reason that our process in respect of costs could be put into effect in those two countries by means of the Judgments Extension Act, 1868. We therefore have to see whether or not the provisions of that Act now apply to the Irish Free State, where the plaintiff in this case is ordinarily resident. In my opinion they do not. That Act applied to the Irish Court of Common Pleas, the Irish Court of Exchequer, and the Irish Court of Queen's Bench. Those Courts disappeared under the provisions of the Judicature Act (Ireland), 1877, and their jurisdiction was transferred to a Supreme Court of Judicature in Ireland consisting, as does the Supreme Court of Judicature in this country, of a High Court of Justice and a Court of Appeal. But there is in the Judicature Act (Ireland), 1877, an express provision applying to the Supreme Court thereby constituted the provisions of any Act of Parliament applicable to the Courts to whose jurisdiction it succeeded, and there can be no doubt that by virtue of that section the Judgments Extension Act, 1868, applied to the Irish Courts as by the corresponding section in our own Judicature Act, 1873, it applied to our own Supreme Court of Judicature then newly established. So matters went on until 1920.

In 1920, by s. 38 of the Government of Ireland Act, 1920, the Supreme Court of Judicature in Ireland as established by the Judicature Act (Ireland) 1877, ceased to exist, and there were established in its place two Courts, a Court having jurisdiction in Southern Ireland, the Supreme Court of

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Judicature of Southern Ireland, and a Court having jurisdiction in Northern Ireland, the Supreme Court of Judicature of Northern Ireland, and also a third Court having appellate jurisdiction throughout the whole of Ireland, the High Court of Appeal for Ireland. It appears to me that if the matter had rested there, inasmuch as the Supreme Court of Judicature in Ireland established by the Judicature Act (Ireland), 1877, had been abolished, the Judgments Extension Act, 1868, would no longer have operated in Ireland, because there was in that country no Court answering the description of the Court to which the Act of 1868, as modified by the Irish and English Judicature Acts, was made to apply. But this difficulty was met by the express provision of the Legislature in s. 41, sub-s. 1, of the Government of Ireland Act, 1920, which applies to the Supreme Court of Judicature in Southern Ireland and to the Supreme Court of Judicature in Northern Ireland respectively, and to the judges and officers thereof, all enactments relating to the Supreme Court of Judicature in Ireland and the judges and officers thereof as they applied to the Supreme Court of Judicature in Ireland. So that there was an express statutory provision which applied the provisions of the Judgments Extension Act, 1868, to the new Courts; and in my opinion the application of that Act depends entirely upon the operation of s. 41, sub-s. 1, of the Government of Ireland Act, 1920. Further, I agree with Bankes L.J., contrary to the contention of Mr. Lipsett, that the Government of Ireland Act, 1920, in so far as it relates to Courts of Judicature, came into force in Southern Ireland on October 1, 1921, by virtue of the Order in Council of September 27 of that year.

Then there came into existence the Irish Free State Constitution Act, 1922. The Constitution thereby established provided for Courts of Judicature by art. 64 and the following articles. By art. 64 "The judicial power of the Irish Free State . . . . shall be exercised and justice administered in the public Courts" established by the Legislature "by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final

Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court." . . . . So the High Court and the Supreme Court are to be two different Courts instead of the one Supreme Court of Judicature of Southern Ireland, which was established by ss. 38 and 39 of the Government of Ireland Act, 1920, and consisted of two divisions, namely His Majesty's High Court of Justice in Southern Ireland and His Majesty's Court of Appeal in Southern Ireland. There follow a number of articles, 73 to 83, under the heading Transitory Provisions. Art. 75 provides that "Until Courts have been established for the Irish Free State . . . . in accordance with this Constitution, the Supreme Court of Judicature "—that is the Court constituted by the Government of Ireland Act, 1920—"County Courts, Courts of Quarter Sessions and Courts of Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore " . . . . and art. 73 provides that "the laws in force in the Irish Free State . . . . at the date of the coming into operation of this Constitution " shall continue to be of full force and effect until the same or any of them shall have been repealed or amended.

Was the Judgments Extension Act, 1868, as applied by s. 41, sub-s. 1, of the Government of Ireland Act, 1920, a law in force in the Irish Free State at the date of the coming into force of the Constitution of the Irish Free State ? In my opinion it was not, because the Government of Ireland Act, 1920, including s. 41, sub-s. 1, of that Act, ceased to have any operation in Southern Ireland by s. 1 of the Irish Free State (Consequential Provisions) Act, 1922, which was passed on the same day as the Irish Free State Constitution Act, 1922, and came into force on December 5, 1922, the day on which it was passed, that is the day before the coming into operation of the Constitution, for by virtue of the King's proclamation the Constitution came into operation on December 6. Clearly therefore the provisions of the Government of Ireland Act, 1920, were not in force when the Irish Free State Constitution came into operation, and therefore art. 73 of the Constitution cannot be relied on as bringing the Judgments Extension Act,

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1868, into force. The only other way in which it can be brought into force is by art. 75 providing that the Supreme Court of Judicature and other Courts shall for the time being continue to exercise the same jurisdiction as before. But this provision dealing in general terms with the temporary jurisdiction of temporary Courts is not enough to re-enact the provisions of a statute which had been expressly repealed, and not enough to invest a Court having jurisdiction over part of Ireland with the reciprocal facilities formerly enjoyed by quite a different Court—namely, one whose jurisdiction extended over the whole island.

For these reasons it appears to me that there is no reason why a person resident in the Irish Free State should not be ordered to give security for costs, as no doubt, if the Irish Free State Courts take the same view, it will follow that there is no reason why a plaintiff resident in England should not be ordered to give security in the Courts of Southern Ireland. The Master fixed a very reasonable sum. His order should be restored and the appeal allowed.

Appeal allowed.

Solicitors for appellants: *Horner & Horner, for Goate & Bullock, Coventry.*

Solicitor for respondent: *Herbert Z. Deane.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A. 1923 *Oct.* 23.

NUNAN *v.* SOUTHERN RAILWAY COMPANY.

[1923. N. 71.]

Fatal Accident—Passenger on Railway—Contract limiting Company's Liability—Whether Limitation extends to Claim by Dependants—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 2.

Where a passenger by railway, who has agreed with the railway company that their liability for personal injury shall not exceed a certain sum, is killed by the negligence of the company's servants, the damages recoverable by his dependants in an action under the Fatal Accidents Act, 1846, are not limited to such agreed sum.

Judgment of Swift J. [1923] 2 K. B. 703 affirmed.

APPEAL of the defendants from a judgment of Swift J. (1)

John Nunan was a passenger by a train belonging to the defendants which travelled from Charing Cross to Milton Range Halt. On arrival of the train at that station, he, in order to leave the defendants' premises, was crossing the line with a number of other passengers, when, owing to the negligence of the defendants' servants, they were run into by another train, and Nunan, amongst others, was killed. At the time of the accident he was a passenger travelling with a workman's ticket issued by the defendants for his use upon terms and conditions similar to those applicable to workmen's tickets issued under the provisions of s. 32 of the South Eastern and London, Chatham and Dover Railway Companies Act of 1899 (62 & 63 Vict. ch. clxviii.) (2), one of those conditions being: "The liability of the company is limited to a sum not exceeding 100*l.*" Elizabeth Nunan, the widow

(1) [1923] 2 K. B. 703.

(2) Sect. 32 of 62 & 63 Vict. ch. clxviii. provided that the Managing Committee of the said companies should run workmen's trains at reduced fares to and from all stations within twenty miles of their several terminal stations in London, and by sub-s. 7: "The liability of the company under any claim to compensation for injury or otherwise in respect of any passenger travelling by any train run or provided under this section or any passenger returning at a fare fixed under and for the purposes of this section shall be limited to a sum not exceeding 100*l.*" That sub-section was not directly applicable to the present case, as Milton Range Halt is more than twenty miles from Charing Cross.

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of the deceased John Nunan, brought this action under the provisions of the Fatal Accidents Act, 1846.

On behalf of the defendants it was contended that as the deceased man had contracted with the railway company that the amount which he could recover for personal injuries or otherwise should not exceed 100*l.* no damages in excess of that amount could be awarded under the Fatal Accidents Act to his widow. Swift J. held that the claim of the widow was not limited by the agreement which the deceased husband had made with the defendants, and he gave judgment for her for 800*l.* damages.

The defendants appealed.

Sir John Simon K.C., *Thorn Drury K.C.* and *C. Ince* for the appellants. The question in this case—namely, whether a stipulation limiting the amount of the defendants' liability is binding on the injured person's representative when suing under the Fatal Accidents Act has never yet been the subject of direct decision. It is contended that the representative is so bound. It could not be disputed that if the stipulation was that the defendants should not be liable at all, that would be a perfectly good defence to an action by the widow. It must equally be a good defence that the stipulation limited the amount of the damages recoverable. It cannot be that the deceased had authority to deprive his widow of all remedy and yet had not authority to deprive her of her remedy in part. But if that contention is wrong, and if the widow's cause of action is entirely distinct from that of the injured person, at all events her right to sue in respect of it is dependent upon the question whether the injured person could, if death had not ensued, "maintain an action and recover damages" in respect of the injury. It is contended that the word "damages" there means full compensation for the injury suffered, and that the injured person would not be entitled to "recover damages" within the meaning of the section where he has by his contract substituted for such full compensation damages of a limited amount. On this reading of the section any limitation of the amount

recoverable by the injured person does not merely limit the amount recoverable by his representative, but bars the right of action of the representative altogether. The affirmance of the decision appealed from might operate to the serious disadvantage of the travelling public, as the railway companies when issuing workmen's tickets would probably protect themselves by stipulating that they should under no circumstances be liable to any damages at all.

[The following authorities were referred to : *The Stella* (1) ; *Haigh* v. *Royal Mail Steam Packet Co.* (2) ; *British Columbia Electric Ry. Co.* v. *Gentile* (3) ; *Read* v. *Great Eastern Ry. Co.* (4) ; *Griffiths* v. *Earl of Dudley* (5) ; *The Vera Cruz* (6) ; *Williams* v. *Mersey Docks and Harbour Board.* (7)]

Schiller K.C. and *Samuels* for the respondent were not called upon.

BANKES L.J. In this case the plaintiff sued under the Fatal Accidents Act, 1846, and the question was raised whether the amount of the damages which she was entitled to recover was limited by the following circumstances : Her husband was, on August 21, 1922, being conveyed by the defendant company upon the terms of a workman's ticket, when unfortunately, owing to the negligence of the defendants' servants, he lost his life, and it was not disputed by the plaintiff's counsel that the ticket under which he was travelling contained a condition that the liability of the company, so far as he was concerned, was limited to 100*l.* In my opinion, having regard to the language of the Act itself and to the decisions upon it, the view taken by Swift J. was the only possible one, and I entirely agree with his careful and clearly worded judgment. What the statute says is : " Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages

(1) [1900] P. 161.
(2) (1883) 49 L. T. 802.
(3) [1914] A. C. 1034, 1041.
(4) (1868) L. R. 3 Q. B. 555.
(5) (1882) 9 Q. B. D. 357.
(6) (1884) 10 App. Cas. 59.
(7) [1905] 1 K. B. 804.

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in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." Upon that the first material question is, At what point of time is it necessary to consider whether the deceased person would have had such a right of action? That point has been settled by the Privy Council in *British Electric Ry. Co.* v. *Gentile.* (1) There Lord Dunedin in delivering the judgment of the Judicial Committee said: "Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place." On the authority of that decision one starts with the question, What was the position of the deceased at that particular moment? In some cases the deceased may not have been entitled at any time to maintain an action for the injury complained of, as where he had by his own negligence contributed to that injury, or, before the act or neglect which caused the injury had been done or committed, he had contracted with the defendants that he would under no circumstances claim any damages for such an act or neglect. In other cases he may originally have been entitled to maintain an action for the injury and may by his own conduct have disentitled himself to maintain it, as where he has compromised a claim in respect of it, or has allowed the time to go by within which under some Act, such as the Public Authorities Protection Act, the action ought to have been commenced. But none of those disabling causes exist in the present case, and the only contention here is that because the deceased had limited his right to recover damages to 100*l.*, the right of his widow was equally limited to that amount. But the statute in specifying the conditions of the widow's right to sue says nothing about the quantum of damages which the deceased must have been entitled to recover, the language is perfectly general—"and recover damages"—and I can see no reason why it should not be read in its natural sense. If it be so read, the deceased was,

(1) [1914] A. C. 1034, 1041.

on the admission of the railway company, entitled to maintain an action and recover some damages, and under those circumstances it seems to me quite immaterial to consider what the amount of the damages would have been that he might have recovered, for this reason, that the quantum of the damages that the dependants may recover under s. 2 is quite different from that which the deceased might have recovered himself. The amount of the damages which the dependants may recover is compensation properly so called. It may seem strange that the dependants can recover a much larger sum than could have been recovered by the deceased, but it has been held by the House of Lords in *The Vera Cruz* (1) that the cause of action of the dependants is a new and distinct cause of action, in respect of which the damages are estimated on an entirely different basis. On these grounds I think the view taken by the learned judge was not only right but was the only possible one, and the appeal therefore fails.

SCRUTTON L.J. This is an action brought under the Fatal Accidents Act by dependants of a deceased person, and the answer to the claim is that the dependants are prevented from recovering more than a certain sum by reason of a contract which the deceased had made with the defendants. I deal with the case on the assumption that the dead man made a contract with the railway company by which, if he had suffered damage by their negligence, he could not have recovered more than 100*l*., for counsel for the plaintiff stated that he did not propose to argue the contrary. I must not be taken as deciding that in a case coming within s. 32, sub-s. 7, of the private Act of 1899, and not depending upon any special contract as here, the sub-section would not be a bar to the action by the dependants.

The Fatal Accidents Act has, I think, been interpreted, by authorities which are binding on us, to mean that the dependants have a new cause of action, yet cannot recover on that cause of action unless the deceased had at the time of

(1) 10 App. Cas. 59.

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his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways; he may have been guilty of contributory negligence; he may have made a contract by which he excluded himself from the right to claim damages, and in such a case as that the decisions in *Haigh* v. *Royal Mail Steam Packet Co.* (1) and *The Stella* (2) show that the right of his dependants would be also barred. Again he may have lost his right from failure to make a claim within the period limited by some statute; or he may have lost it by reason of a release by accord and satisfaction. In all these cases, if he could not have brought an action at the time of his death neither can his dependants.

Then it is argued that if that is so his dependants must equally be bound if he has made an agreement which, while leaving him a cause of action, limits the amount which he can recover. I agree that it looks odd that he should be able to bar his dependants entirely, and yet should not be able to bar them in part, but one must be guided by the words of the statute. The moment one attempts to transfer the provisions as to the amount of the liability (as distinguished from the liability itself) from the contract of the deceased to the rights of his dependants one gets into a difficulty. For their damages are not the same as the damages of the deceased; they are calculated on quite a different principle; they include some matters for which he could not claim, and exclude others for which he could. The only way that has occurred to me by which the difficulty could be got over is to treat the damages over 100*l.* as being a separate cause of action, and to say that as he could not bring an action for sums over 100*l.* his dependants could not bring an action for sums over 100*l.* either. But the objection to that is that it involves the splitting up of a cause of action, a process which is not permitted by English law. Under these circumstances we must follow the language of the statute, and that language compels us to say that as the dead man could at the time of his death have brought an action for some

(1) 49 L. T. 802. (2) [1900] P. 161.

damages his dependants can bring an action for their own and quite different damages. I agree that the appeal must be dismissed.

ATKIN L.J. I agree; but I also desire not to express any opinion upon the question as to what the position of the dependants would be in a case which came directly within the provisions of s. 32, sub-s. 7, of the special Act. In the present case it was conceded by the plaintiff's counsel that the deceased was being carried under a contract which limited the company's liability to him to the sum of 100*l.* In my opinion that contract does not defeat the claim of the plaintiff. The defence to the claim was put in an alternative form; it was said that either the limitation of liability applied to the widow's claim so that she could not recover more than 100*l.* damages, or else that the condition imposed upon the plaintiff's right of suit by s. 1—namely, that the deceased should have been entitled to "recover damages"—meant that he should have been entitled to recover the full amount of his loss, and that consequently the fact that the deceased had by his contract limited the damages that he could recover took the case out of the Act, with the result that the widow could recover nothing at all. In my opinion both those contentions are wrong. With regard to the latter alternative, it is sufficient answer to say that that contention involves reading into the section something that is not there, and that the Court is not justified in doing so. The words of the section are satisfied; the man had at the time of his death a right to maintain an action and recover some damages; and that is enough. The answer to the former alternative is that the dependants under the Fatal Accidents Act have an entirely different cause of action from that which the deceased person had. In the words of Lord Blackburn in *The Vera Cruz* (1), their cause of action is "new in its species, new in its quality, new in its principle, in every way new." Under those circumstances, if the contract made by the deceased is only a contract that puts a limit to the amount

(1) 10 App. Cas. 59, 70.

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of the damages that he can recover, it is difficult to see how that can have any relation to a claim made by the dependants on a different cause of action and in respect of a different measure of damages. The circumstances may be entirely different. The deceased person could, if he were alive, only bring an action to recover compensation for his own personal injuries, which ex hypothesi fall short of the consequences of his death; and it may well be that the sum of 100*l.* might more than cover the damages to which he would be entitled. On the other hand, the dependants bring their action substantially for the loss of the breadwinner of the family; and that is a very different matter. For my part I fail to see any logical relation between the fact that there is a limit to the damages which the deceased person could have recovered and the amount of the damages recoverable by the dependants. It seems to me that there is no defence to the action at all, and for the reasons above given, which are substantially those given by Swift J. in his carefully considered judgment, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants: *William Bishop.*
Solicitor for the respondent: *W. C. Crocker.*

J. F. C.

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Oct. 25,
26, 31.

[1923. B. 704.]

Landlord and Tenant—Notice of Increase of Rent—Landlord responsible for Part only of the Repairs—No Agreement as to Amount of Increase—No Determination by County Court as to fair and reasonable Amount of Increase—Agreement subsequent to Notice—Validity of Notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*d*).

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 1, it is provided that the amount by which the increased rent of a dwelling house to which the Act applies may exceed the standard rent shall be: "(*d*) . . . . (ii.) where the landlord is responsible for part and not the whole of the repairs, such lesser amount [than twenty-five per cent. of the net rent] as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court to be fair and reasonable having regard to such liability":—

Held, that a landlord who is responsible for only part of the repairs is not entitled to serve a notice claiming an increase of rent under s. 2, sub-s. 1 (*d*), of the Act of 1920 until the amount which he is entitled to claim has been ascertained either by agreement or by the determination of the county court judge, and that where in such a case a notice is served upon the tenant containing an amount of increase of rent inserted in it which has not been ascertained either by agreement or by the determination of the county court judge at the date the notice is served the notice is invalid, and further that an agreement between the parties after the date of the notice cannot make the notice a valid notice.

Action tried by Greer J.

The plaintiff, who was the owner of a house, No. 16 Trebovir Road, Earl's Court, London, claimed against the defendant, who was the tenant of the house, possession, 33*l.* 5*s.* arrears of rent, and mesne profits at the rate of 133*l.* per annum from December 25, 1922. The plaintiff's claim to possession was based on the non-payment of the sum of 33*l.* 5*s.*, which he alleged became lawfully due on December 25, 1922.

The following statement of facts is taken from the judgment:—

The defendant became tenant of the premises on June 8, 1917, for one year from September 29, 1917, with an option to

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continue the tenancy for three years from September 29, 1918. By agreement between the defendant and the plaintiff's predecessors in title she was granted a further tenancy of one year which terminated on September 29, 1922.

The plaintiff purchased the property by contract on July 27, 1920, and the same was duly assigned to him on August 8, 1922.

By her tenancy agreement the defendant agreed to keep all gutters, stack pipes, water closets, gullies and cisterns clean and in good sanitary condition, and to keep in repair all window glass, sash lines and internal pipes and taps, and also to maintain and keep in repair all venetian and other blinds, and not to use or allow the premises to be used for any trade or business or for any illegal or immoral purpose, nor commit or permit anything which may be or constitute a breach of the superior lease, and not to use or allow the same to be used otherwise than as a private dwelling house without the previous consent in writing of the landlords, and not to assign or underlet the premises without the consent in writing of the landlords, such consent not to be arbitrarily withheld. The agreement also contained a proviso for re-entry in case the rent was in arrear for twenty-one days.

The defendant used the premises partly for the purpose of residence for herself when she was in London, when she occupied three rooms, and she sublet the balance of the premises to others, and with her knowledge and consent one room in the house was used for dances and for a short time for the teaching of dancing.

On May 2, 1921, after the defendant had become tenant to the plaintiff and paid rent to him, the plaintiff served on the defendant a notice to increase the rent by the amount of 19*l.* per quarter. This notice treated the premises as business premises and asked for an increase of 35 per cent. on that ground by para. (*c*), and by para. (*d*) asked for 6*l.* 17*s.* 6*d.*, being 25 per cent. on the net rent of the premises. On February 23, 1922, he served a further notice claiming an addition of 15 per cent. under para. (*c*) and 25 per cent. under para. (*d*), the 25 per cent. in these two notices obviously

being claimed upon the assumption that the landlord as landlord did all the repairs. In my judgment both these notices were invalid.

On August 24, 1922, the plaintiff sent to the defendant a further notice claiming 15 per cent. increase under para. (*c*) of the notice, which is admittedly in order, and 15 per cent. under para. (*d*). At the time the notice was served no agreement had been come to between the plaintiff and the defendant under s. 2, sub-s. 1, para. (*d*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), with reference to the amount which the landlord was entitled to claim as being responsible for part only of the repairs, and no application had been made to the county court under s. 2, sub-s. 6, of the said Act, to determine the question as to what was fair and reasonable having regard to such liability; but after the notice had been served correspondence took place between the plaintiff and his solicitors and the defendant and her solicitors which it was alleged amounted to an agreement that 15 per cent. was the amount by which the plaintiff was entitled to increase the rent by reason of his responsibility for repairs, and reliance was placed particularly on two letters from the defendant's solicitors to the plaintiff's solicitors, one dated October 25, 1922, and the other dated November 14, 1922.

G. W. Powers for the plaintiff. The plaintiff is entitled to judgment for possession, as the defendant did not pay the rent which became lawfully due on December 25, 1922,

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 1: "The amount by which the increased rent of a dwelling house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say:— . . . . (*c*) In addition to any such amounts as aforesaid, an amount not exceeding fifteen per centum of the net rent. . . . . (*d*) In further addition to any such amounts as aforesaid—(i) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent; or (ii) where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court to be fair and reasonable having regard to such liability."

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by reason of the notice of increase of rent served upon the defendant on August 24, 1922. That notice was a good notice, as there was a subsequent agreement between the parties that the amount of 15 per cent. inserted in it was the amount by which the plaintiff was entitled to increase the rent under s. 2, sub-s. 1, of the Increase of Rent, &c. (Restrictions), Act, 1920: *Elliott* v. *Ellis*. (1)

Hilbery for the defendant. The notice under which the increase of rent was claimed was invalid, as it was not in the form prescribed by the statute. That form must be strictly followed: see *Penfold* v. *Newman*. (2) The notice of increase served must be correct not only in form but also in substance, and it must accurately state the amount of the increase of rent which the landlord has a legal right to claim. The liability upon a tenant to pay increased rent does not under s. 3, sub-s. 2, begin till the expiration of four clear weeks after the service by the landlord upon the tenant of a valid notice of his intention to increase the rent. Under s. 2, sub-s. 1 (*d*), where a landlord is responsible for part and not the whole of the repairs, as in the present case, he is only entitled to increase the standard rent by such lesser amount than 25 per cent. as may be agreed, or as may be determined by the county court to be fair and reasonable. In the present case there was no agreement between the parties as to the amount of the increase at the date the notice was served, and there has been no determination by the county court. The notice was merely a conditional one, and that does not comply with the requirements of the statute. There was no subsequent agreement between the parties as to the amount of increase, and if there was an agreement it could not validate the notice.

G. W. Powers in reply. The notice of increase of rent which the landlord gave on August 24 was a good notice apart from agreement. Sect. 2, sub-s. 1 (*d*), of the Act of 1920 does not say that the amount by which the rent may be increased shall have already been agreed when the notice of increase is served or shall have been already determined

(1) [1923] 2 I. R. 45. (2) [1922] 1 K. B. 645.

by the county court. No question can arise under that sub-section until the notice of increase is served, and until a question arises an application cannot be made to the county court under s. 2, sub-s. 6, for the determination of that question. According to the defendant's contention a landlord would have to serve a notice in the air, and, if the tenant objects to the amount of the increase, go to the county court for the determination of the question, and subsequently serve upon the tenant another notice, which would be an absurd procedure. If the tenant agrees the amount of increase, or if the county court in case of no agreement determines the amount of increase as stated in the notice to be fair and reasonable, the notice is a valid notice. Shearman J. expressly said in *Penfold* v. *Newman* (1) that their decision did not apply to notices of increase under s. 2, sub-s. 1 (*d*).

Cur. adv. vult.

Oct. 31. GREER J. read the following judgment: The plaintiff in this case is the owner of the reversion of a house known as No. 16 Trebovir Road, Earl's Court, London, and claims against the defendant, who was the tenant of the plaintiff's predecessor in title, and of the plaintiff, of the said premises, possession, 33*l*. 5*s*. arrears of rent, and mesne profits at the rate of 133*l*. per annum from December 25, 1922.

The defendant, who admitted the plaintiff's title as landlord, defended the action on the ground that the rent claimed was in excess of the rent which the plaintiff was entitled to claim by reason of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and denied the plaintiff's right to possession.

The plaintiff's claim to possession was based on the non-payment of the sum of 33*l*. 5*s*. which he alleged became lawfully due on December 25, 1922.

The question I have to decide is whether the rent so claimed did become so lawfully due. The material facts are as follows:

(1) [1922] 1 K. B. 653.

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[His Lordship stated the facts set out above and continued :] If the notice which the plaintiff sent to the defendant on August 24, 1922, was a valid notice the rent claimed by the plaintiff which has not been paid was rent lawfully due, and the question to be determined is whether the notice was valid or not.

It was contended for the defendant that the notice of August 24, 1922, was invalid, because when it was sent there had been no agreement as to the amount less than 25 per cent. by which the landlord was entitled to increase the rent, and no determination by the county court ; that their subsequent agreement could not make the notice valid ; that the notice was invalid by reason of the letter which accompanied it, and that the letters relied upon did not amount to an agreement that 15 per cent. was the proper sum to charge under para. (*d*), although the defendant had made an offer to agree to pay the total amount of 133*l.* per annum if certain repairs were done. The defendant's counsel further contended that if I did not agree with his contentions I ought to say in exercise of my discretion under s. 5 of the Act that in any event it was not reasonable to make an order or give judgment for possession.

I have come to the conclusion that the notice was invalid by reason of the fact that the figure inserted in para. (*d*) had not been ascertained either by agreement or by the determination of the county court judge at the date of the notice, and that the fact that the defendant by her solicitors said she would be prepared to pay the rent of 133*l.* per annum in accordance with the notice does not make the notice a valid one. It is in my judgment unnecessary to consider the effect of the letter which accompanied the notice. Sect. 2 of the Act deals with the permitted increases. The only one it is necessary to consider is that provided for in sub-s. 1 (*d*), which deals with the costs of repairs. Until he brings himself within the terms of that sub-section the landlord is not in a position to claim any increase in rent in respect of the repairs. Before he can increase the rent a valid notice has to be given by the landlord under s. 3 in the form contained in the first

Schedule to the Act. Para. (*d*) is the part of the Schedule which has to be filled up with the amount of the increase in respect of repairs and the percentage it bears to the net rent. These amounts cannot be inserted in the notice accurately until they are ascertained, in the case of a landlord responsible for part of the repairs, either by agreement or by the determination of the county court judge. In my judgment a landlord who is responsible for only part of the repairs is not entitled to serve any notice claiming an increase under sub-s. 1 (*d*) of s. 2 of the Act until the amount which he is entitled to claim has been ascertained by agreement or by the determination of the county court judge. It is to be observed that the tenant has a period of four weeks at the old rent after a valid notice before the increase can be claimed. It seems clear that if no figures had been filled up in para. (*d*), no increase could be claimed under the head of repairs. In my judgment the notice is not made valid by the fact, if it be a fact, that after the service of the notice the tenant expressed her willingness to pay the full amount, nor do I think the letters relied upon amount to an agreement that the amount claimed in the notice under para. (*d*) is the proper amount due in respect of repairs. They only amount to an expression of willingness to pay the total amount claimed if the landlord recognizes the position that he is liable to do on the premises the repairs dealt with in the correspondence, but whether I am right on this latter point or not, it seems to me that an agreement after the date of the notice does not render the notice a valid one. After the agreement, if there was any in this case, a fresh notice should have been served, and the four weeks would then have run from the date of the fresh notice.

There is no English authority directly in point, but this judgment is supported by the observations of Salter J. in giving judgment in *Penfold* v. *Newman* (1), where after referring to s. 3, sub-s. 2, of the statute he says: "That provision increases the stringency of the legislation in two respects, first, by requiring that the notice shall be a 'valid'

(1) [1922] 1 K. B. 645, 654.

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notice, and, secondly, by providing a statutory form of notice and requiring that the notice shall be in accordance with that form. As to the first of these requirements, it is to be observed that the word 'valid' means more than correct in form. It means correct not only in form but also in substance. If it had only been intended that the notice should be correct in form there would have been no reason why the present Act should not have contained the same provision as the earlier Act contained. There must have been some reason for the insertion of the word 'valid' in the amending Act. I think the term was inserted because it was intended that the notice should be correct in substance as well as in form, and should accurately state all material facts, including the amount of the increase of rent which the landlord has a legal right to claim. As to the requirement that the notice should be in accordance with the statutory form, it is to be observed that the form makes provision for the accurate statement of the percentage of increase under s. 2, sub-s. 1 (*c*)." Applying these observations to the present case, it seems to me that the notice was invalid in that it claimed under s. 2, sub-s. 1 (*d*), an increase which at the date of the notice the landlord had no legal right to claim. An Irish case, *Elliott* v. *Ellis* (1), was cited in support of the plaintiff's claim. This case is indeed an authority in the plaintiff's favour. But I am not bound by it, and in my judgment it was wrongly decided.

I regret that the plaintiff's claim, which has all the merits, should fail. But I have only to interpret an Act of Parliament that in many respects imposes unmerited hardships on landlords.

My judgment is for the defendant, and it must be with the usual consequences to a plaintiff who fails to establish a legal claim, that is to say with costs.

Judgment for defendant.

Solicitors for plaintiff: *Seatle & Morrison.*

Solicitors for defendant: *Valpy, Peckham & Chaplin.*

(1) [1923] 2 I. R. 45.

R. F. S.

MAYOR, ETC., OF CHESTER *v.* BRIGGS.

1923
Oct. 30, 31.

Local Government—Urban Authority—Private Street Works—Resolution—Expenses—Objections—Contribution by Frontagers—Amendment by Justices—Jurisdiction—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8, 10, 15.

The Private Street Works Act, 1892, provides (s. 6) that an urban authority may pass a resolution with respect to private street works, and (s. 10) that the expenses incurred in executing such works shall be apportioned among the frontagers, unless the urban authority otherwise resolve.

By s. 7 provision is made for objections by frontagers, and by s. 8 these are to be heard and determined by a Court of summary jurisdiction, which may quash or amend the resolution on the application either of an objector or of the urban authority. By s. 15 the urban authority may at any time resolve to contribute the whole or a portion of the expenses of any private street works and may pay the same out of the district fund:—

Held, that in the absence of a resolution of the urban authority under s. 15, justices engaged in hearing objections under s. 8 have no power to insert by way of amendment to a resolution under s. 6 a resolution that the urban authority shall contribute in whole or in part to the expenses of private street works.

Per Salter J. In considering an objection under s. 7 (*d*) that the proposed works are unreasonable the justices are entitled to consider (inter alia) whether it is reasonable that such works should be carried out at the frontagers' expense.

CASE stated by justices for the City of Chester.

The appellants were the urban sanitary authority for the city and county of the City of Chester. By resolution dated September 28, 1921, the appellants resolved to do certain private street works with respect to a street known as Grange Road, which was a "street" within the Private Street Works Act, 1892, and was situated in the appellants' district.

Their surveyor duly prepared as respects the said street a specification of the works referred to in the said resolution, with plans and sections, and an estimate of the probable expense, and a provisional apportionment, based on frontages only, of the estimated expenses amongst the premises liable to be charged therewith under the Act. Such specification, plans, sections, estimate and provisional apportionment

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comprised the particulars prescribed in Part I. of the Schedule to the Act, and were duly submitted to the appellants and approved by them by resolution dated December 14, 1921.

The resolution of December 14, 1921, was duly published in the manner prescribed in Part II. of the Schedule to the Act, and within seven days of the date of the publication thereof copies thereof were duly served on the owners of the premises (including the respondents) shown as liable to be charged in the said provisional apportionment. Such specification, plans, sections, estimate and provisional apportionment were later amended by the appellants' surveyor, and when so amended were duly submitted to the appellants and approved of by them by resolution dated February 28, 1923.

The resolution of February 28, 1923, was published in the manner prescribed in Part II. of the Schedule to the Act, and within seven days of the date of the publication thereof copies thereof were served on the owners of the premises (including respondents) shown as liable to be charged in the said provisional apportionment. The estimated cost of the proposed works was 3933*l.* 13*s.* (which amount included a 5 per cent. commission or profit for the appellants), the whole to be borne by the owners (including the respondents) in accordance with the provisional apportionment. During one month from the date of the first publication the approved specification, plans, sections, estimate and provisional apportionment were kept deposited at the appellants' offices and were open to inspection at all reasonable times. The proposed works were to be constructed to cope with the present heavy traffic using the said road, and on the basis that Grange Road would in future relieve the traffic upon a first-class public main road repairable by the appellants known as Liverpool Road and near to Grange Road, and that the expense of such proposed works was greater than would be the case if such road were to be constructed in accordance with the specification required to cope with the traffic of roads similar in class and character to Grange Road.

The appellants had not at any time resolved to contribute any portion of the expenses of any of the said proposed works.

According to the case stated, the above facts were proved or admitted at the hearing.

The Private Street Works Act, 1892, s. 7, enables owners of premises shown in the provisional apportionment as liable to be charged with part of the expenses of such street works to lodge their objections by written notice served upon the urban authority within one month after the publication of the approved specification.

The respondents, who were owners of some of the premises shown in the appellants' apportionment, accordingly lodged the following objections :—

(*a*) That the estimated expenses were excessive and/or unreasonable.

(*b*) That the estimated cost of part of the frontage had been levied on the whole of the frontages instead of on the actual owners of such part.

(*c*) That the provisional apportionment was incorrect in respect of the degree of benefit to be derived by users of the road or the value of work already done by the owners of certain premises.

(*d*) That no consideration had been given in the preparation of the apportionment, to the provisions of s. 10 (*a*) of the Private Street Works Act, 1892, and that the apportionment in apportioning the cost of making the street should include premises which did not front, adjoin or abut on the street or part of street but access to which was obtained from the street, which would be benefited by the said works.

(*e*) That the estimated cost of the new nine-inch sewer had been levied on the whole of the frontages notwithstanding the fact that a sewer to which some of the objectors' property was connected already existed in the street, and that the cost of any repair to the existing sewer should be borne by the Council.

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(*f*) That the street or part of it was a highway repairable by the inhabitants at large.

(*g*) That the said road was not a street within the meaning of the Act.

(*h*) That there was some defect in the resolution, notice, plan and/or estimates.

(*i*) That the estimate was more costly because of the user of the said road by certain heavy traffic, and that the owners of such heavy vehicles should pay such additional cost occasioned by such traffic.

(*j*) That a part of the said road had been repaired by some of the owners of property fronting thereon, and that such owners should not pay so much per yard frontage as other owners who had not contributed to such repair.

(*k*) That owing to the high cost of labour and materials the work should be postponed.

The justices heard these objections on May 18, 1923, and found as follows :—

(i.) That the proposed street works were necessary ;

(ii.) That having regard to the designed object of such road as a relief road, it was unreasonable that the owners (including the respondents) should bear the whole expense of such works, and that a portion of the expense of such works should be borne by the appellants ;

(iii.) That under s. 15 of the said Act the appellants could, had they so chosen, have resolved at any time to contribute a portion of the expense of the proposed works ;

(iv.) That s. 8, sub-s. 1, of the Act conferred upon them (amongst other powers) the power to amend any resolution of the appellants passed by them as the urban authority under the said Act.

They therefore held and determined, (1.) that the specification and estimates of the appellants' surveyor be approved, and (2.) that the resolution of the appellants be amended so as to read " that the Council contribute Fifteen per cent.

of the total cost" of the works. The appellants being dissatisfied with the justices' amendment of the appellants' resolution, as being erroneous in point of law and in excess of jurisdiction, applied to the justices to state a case for the opinion of the High Court. The justices thereupon stated this case, the question for the opinion of the Court being whether upon the above statement of facts the justices came to a correct decision in law.

Montgomery K.C. and *Roland Burrows* (*Austin Jones* with them) for the appellants. The justices have no power by virtue of s. 8 of the Private Street Works Act, 1892, to insert a resolution such as is contemplated by s. 15, calling on the urban authority to pay a portion of the expenses of street works. Prima facie, by s. 6, these expenses are to be paid by the frontagers, and a resolution apportioning these expenses is to be served on them. The justices may hear any objection by owners on the ground of error in the resolution under s. 7 (*c*), and correct the error, but beyond this they cannot go. There was here no resolution by the urban authority, and in the absence of such resolution, the justices have no power to say that the apportionment is to be based on any other consideration than that of frontage: *Bridgwater Corporation* v. *Stone*. (1) It is not contemplated by s. 7 (*d*) that the justices should consider whether it is "reasonable" that the works should be carried out at the frontagers' expense, but only whether the works are in themselves reasonable.

Greaves-Lord K.C. and *Heathcote-Williams* for the respondents (other than Cullimore). The justices have a discretion under s. 8 of the Act to amend any resolution by the urban authority, and it is not a condition precedent to the exercise of this power that there should be a resolution under s. 15. The proposed works were necessary, as the justices have in fact found, and it is unreasonable that the respondents together with other owners should bear the whole expense of the works, which will relieve the traffic on a public main road.

(1) (1908) 72 J. P. 487; 99 L. T. 806.

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Sidebottom for Cullimore, the other respondent. A resolution of the urban authority is a condition precedent in the case of s. 10 before the justices can interfere, but that is not the case under s. 15, which corresponds rather to s. 6. Under s. 6 the justices have power to amend the resolution of the urban authority upon objections by frontagers: *Twickenham Urban Council* v. *Munton*. (1) The same jurisdiction exists under s. 15.

Montgomery K.C. in reply.

LORD HEWART C.J. [after stating the facts and findings of the justices continued:] The question for this Court is whether upon those facts the justices came to a correct determination and decision in point of law.

The matter falls within a very small compass. By s. 6 of the Private Street Works Act, 1892, it is provided that the expenses incurred by the urban authority in executing private street works shall be apportioned, subject as in the Act mentioned, on the premises fronting, adjoining or abutting on the street. Then by s. 7 provision is made for objections, and those objections may include the objection taken here, that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive. Next by s. 8 it is provided that the objections shall be heard and determined, and incidentally that the Court which hears and determines those objections "may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionment, or any of them, on the application either of any objector or of the urban authority." By s. 10 it is provided that in a provisional apportionment the expenses shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the premises; but the urban authority, if they think fit, may resolve that in settling the apportionment regard shall be had to "(*a*) the greater or less degree of benefit to be derived by any premises from such works." If that course is taken, then it is a relevant

(1) [1899] 2 Ch. 603.

objection under s. 7 (*f*) that the provisional apportionment is incorrect in respect of the degree of benefit to be derived by any premises. Finally, by s. 15 it is provided that the urban authority, if they think fit, may at any time resolve to contribute the whole or a portion of the expenses of any private street works, and may pay the same out of the district fund or general district rate or other rate out of which the general expenses incurred under the Public Health Act, 1875, are payable.

The real question here is whether in the absence of such a resolution as is contemplated by s. 15 the justices engaged in the task of hearing and determining objections as provided by s. 8 can amend a resolution which is before them by inserting, in substance, a resolution under s. 15. In my opinion the justices have no such power. Under s. 15 the discretion upon the question whether the urban authority shall contribute the whole or a portion of the expenses of any private street works is, as might be expected, left to the urban authority themselves. It would be a strange result if those who have control of the finances of the city are to abstain from passing a resolution putting a charge upon the rate-payers as a whole, and nevertheless the justices, dealing with a resolution upon a different, though similar, matter, should take a course for the urban authority which the urban authority had declined to take for themselves. I am satisfied that it is a condition precedent to the contribution of the whole or a part of the expenses of any private street works that the urban authority should at some time pass a resolution to that effect; and it was not an amendment of the resolution which was before the justices to insert apt words to give effect to a resolution under s. 15. To purport to amend the resolution which was before the justices in that way was either to amend a resolution not before the justices, or in effect to pass a resolution for the urban authority.

Now here the urban authority had not passed a resolution under s. 15. What then was the question for the justices to decide? They had to decide, in the absence of such a resolution, and having no power indirectly to secure

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the effect of such a resolution, whether the proposed works were unreasonable. Their findings as they stand are a little ambiguous. It is true that they find that the works were necessary, but they go on to say that having regard to the designed object—that seems to be something in futuro —of such a road as a relief road, it was unreasonable that the owners, including the respondents, should bear the whole expense of such works, and that a portion of the expense of such works should be borne by the appellants. Then they go on to insert, by way of purported amendment, in the resolution the stipulation that the Council shall contribute 15 per cent. of the total cost.

What precisely is the meaning to be attributed to those statements taken together may be a matter of some controversy. One person may take one view of it, and another person may take another. For myself, I do not propose to make any conjecture. I think the case must go back to the justices with this direction: That s. 15 of the Act gives to the urban authority, and to the urban authority alone, the discretion upon the question whether there shall be a contribution on the part of the urban authority to the expenses of the works, and the justices have the duty of considering the questions raised by the objections with the knowledge that whatever else they may lawfully do they cannot act as if a resolution under s. 15 had been passed. They must consider the matter as it stands before them in the absence of a resolution under s. 15. I think, therefore, that this appeal to that extent succeeds.

SANKEY J. I agree. I think that the spirit and scope of the Private Street Works Act, 1892, is to give jurisdiction as to the making of private streets to the local authority, subject to some check and control by the justices. Sect. 15 of the Act, as it appears to me, gives a discretion to the urban authority to decide whether they will contribute the whole or any portion of the expenses of any private street works. I do not think the justices have power by any decision to embarrass or fetter the exercise of such discretion of the

urban authority or any power to compel such authority to pass any resolution on the subject, or to pass a resolution for them, as in effect they have purported to do in this case. The justices can, under s. 7, decide, on proper objection taken, that certain works are unreasonable, but they cannot directly compel the performance of works which they think are reasonable. I do not for a moment think or say that they would wish to do indirectly what they have no power to do directly. I agree with my Lord that this appeal should be allowed, and the case remitted in the way suggested.

SALTER J. I am of the same opinion. The justices, under s. 8, sub-s. 1, sit to hear objections under s. 7. The only resolution which they have power to amend under s. 8 is the resolution made under s. 6, sub-s. 2. The only amendments to that resolution which they can make are such amendments as are necessary to give effect to the frontagers' objections so far as they think the objections are valid. They have no power to amend a resolution made under s. 6, sub-s. 2, so as to turn it in effect into a resolution made partly under s. 6, sub-s. 2, and partly under s. 15. Having regard to the arguments addressed to this Court by the appellants I think it right to add this. This is a statute which imposes on individuals the cost of works which are partly for their own benefit and partly for the benefit of others. In considering an objection under s. 7 (*d*) that the proposed works are unreasonable, the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense.

Appeal allowed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for J. H. Dickson, Town Clerk, Chester.*

Solicitors for the respondents: *Lovell, Son & Co., for Walker Smith & Way, Chester; Rider, Heaton & Co., for Birch, Cullimore & Co., Chester.*

F. P. F.

1923
Nov. 4.

LONDON COUNTY COUNCIL *v.* LORD MAYOR, ETC., OF BIRMINGHAM.

Children—Certified Industrial School—Education Authority—Offence—Residence—Breach of Recognizance—Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1; *s.* 6, *sub-s.* 5—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 58, *sub-ss.* 1 *and* 2; *s.* 74, *sub-ss.* 2 *and* 3.

The Children Act, 1908, s. 58, sub-s. 2, enables a Court of assize or quarter sessions or petty sessions in certain cases where a child under twelve years is charged with an offence, to order the child to be sent to a certified industrial school. By s. 74, sub-s. 2, of the same Act it is the duty of the local education authority of the district in which the child resides to provide for his reception and maintenance in such a school, and (sub-s. 3) for the purposes of the foregoing section a child is presumed to reside "in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place."

A boy of eleven was charged with larceny and placed on probation for twelve months. Within that period he broke the conditions of his probation and was ordered by the Court to be sent to a certified industrial school:—

Held, that in deciding the liability of the local authority for his maintenance the only material question was his place of residence at the time when the offence of larceny was committed, and not when the breach of the conditions of probation occurred.

CASE stated by Birmingham stipendiary magistrate.

At a Court of summary jurisdiction sitting at Birmingham on February 28, 1923, one Edgar George Matthews, a child apparently under the age of twelve years, was ordered to be sent to a certified industrial school, and his place of residence was in the order specified to be Holloway in the area of the London County Council. On May 30, 1923, the London County Council applied to the stipendiary magistrate under s. 74, sub-s. 7, of the Children Act, 1908, sitting as a petty sessional Court, and complained that the child Matthews was resident in Birmingham in the area of the Birmingham Education Authority. It appeared from the case stated that at the hearing of the application the following facts were proved or admitted:—

(1.) That the boy Matthews was born on August 26, 1911.

(2.) That he was charged on February 15, 1922, at the above Court of summary jurisdiction with larceny on February 11

1922, and was placed on probation under the Probation of Offenders Act, 1907, for a period of twelve months, the conditions of his recognizance being that he should be of good behaviour and should be under the supervision of the probation officer of the Court to whom he should report any change of address or employment.

(3.) At the time Matthews committed this offence and was put on probation he was residing with his parents at Bolton Park Road, Birmingham, within the area of the Education Authority of that city.

(4.) In April, 1922, Matthews was sent to a Roman Catholic Boys' School at Poleshill in Warwickshire, where he stayed until July, when he returned to his parents, who then resided in Malvern. He resided in Malvern with his parents until the following November, when he came to London with his parents.

(5.) On February 14 and 28, 1923, Matthews was charged before the Birmingham justices with having broken the conditions of his probation, the probation officer giving evidence to the effect that since July, 1922, he had been unable to trace the boy's whereabouts and that the boy had stolen 1*l.* from his mother with which he had come to Birmingham on February 10, 1923.

(6.) Upon proof of the breaking of the conditions of probation Matthews was committed to an industrial school.

(7.) From November, 1922, until his arrest in Birmingham in February, 1923, Matthews resided in London with his parents at 10 Manhattan Mansions, Holloway.

On behalf of the appellants it was contended (inter alia) that under the Probation of Offenders Act, 1907, s. 1, sub-s. 1, and s. 6, sub-s. 5, upon proof of failure to observe any condition of a recognizance the only punishment that the Court could inflict was a punishment in respect of the original offence: that when Matthews was committed to an industrial school in February, 1923, he was convicted of the original offence (as appeared from the order of the Court) and not of a breach of the conditions of his probation; that s. 74, sub-s. 3, of the Children Act, 1908, must be read in conjunction with s. 74, sub-s. 2, of the Act, and that sub-s. 3 indicates the

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time of the commission of the offence or the time of the occurrence of the circumstances for which the child is being sent to a certified industrial school, as the material time to be considered by the Court in fixing the child's residence, and that in particular that contention was borne out by the use of the word "resided" in sub-s. 3; that the words in s. 74, sub-s. 3, "the circumstances which rendered him liable to be sent to a certified school," had no bearing on the present case, but related only to the case of a child sent to an institution in the circumstances referred to in s. 58.

On behalf of the respondents it was contended that s. 1, sub-s. 1, and s. 6, sub-s. 5, of the Probation of Offenders Act, 1907, were intended to regulate the form of conviction and extent of punishment in respect of breach of the conditions of probation, and had no application to the present case; that the obligation to maintain a child is thrown by s. 74, sub-s. 2, of the Children Act, 1908, upon the Education Authority for the district in which the child resides at the time of his committal to the school, and for this purpose it is presumed by s. 74, sub-s. 3, that a child resides in the district in which the offence was committed or the circumstances which rendered him liable to be sent to a school occurred, unless it is proved that he resides in some other district, and that at the time the circumstances occurred which brought about his committal to a school the boy resided in London.

Upon the above facts the stipendiary magistrate held that the appellants were liable for the maintenance of the child on the grounds that the breach of the conditions of probation took place while the boy resided in London, and that unless such breach had taken place the boy would not have been committed to the industrial school. He accordingly refused to make an order transferring the liability to the Birmingham Education Authority. The question for the Court was whether on the above facts the decision of the stipendiary magistrate was right in law.

Engelbach for the appellants. In considering the question of the child's residence, sub-ss. 2 and 3 of s. 74 of the

Children Act, 1908, must be read together. The "offence" in sub-s. 3 means the original offence for which the child was convicted. The "circumstances which rendered him liable to be sent to a certified school" refer to the circumstances mentioned in s. 58 of the Act—e.g., where the child is found begging or receiving alms.

[He was stopped.]

Norman Birkett for the respondents. The sole question for the Court of summary jurisdiction at the boy's trial on February 14 and 28, 1923, was whether he had broken the conditions of his probation. That was the offence with which he was charged, and at the date of that offence he resided in London. The "circumstances which rendered him liable"—to quote the words of s. 74, sub-s. 3—were here the breach of his probation, and it was his residence at that date which decided the liability for maintenance. Prima facie the place of residence was Birmingham, where the original offence was committed, but as that presumption was displaced by evidence of his residence in London at the date of the breach, the magistrate was right in his decision and the Court will not interfere: *Leicester Corporation* v. *Stoke-on-Trent Corporation.* (1)

LORD HEWART C.J. [after stating the facts and the magistrate's decision continued:] The Children Act, s. 58, sub-s. 1, sets out various circumstances in which a child under the age of fourteen may, subject to certain conditions, be sent to an industrial school, as, for instance, where the child is found begging or receiving alms. Sub-s. 2 of s. 58 deals with quite a different state of affairs: "Where a child apparently under the age of twelve years is charged before a Court of assize or quarter sessions or a petty sessional Court with an offence punishable in the case of an adult by penal servitude or a less punishment, the Court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to a certified industrial school." In other words, under sub-s. 1 there may be circumstances

(1) (1918) 88 L. J. (K. B.) 836.

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which render the child liable to be sent to an industrial school; under sub-s. 2 the alternative of sending him to a certified industrial school may be adopted where he is charged with an offence. In either case it is clear that a question may arise as to the child's residence, because the answer to that question will determine the liability for his maintenance. That is provided for by s. 74, of which sub-s. 1 provides: "Where a youthful offender is ordered to be sent to a certified reformatory school, it shall be the duty of the council of the county or county borough in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to the requirements of this Part of this Act." Then sub-s. 2 provides: "Where a child is ordered to be sent to a certified industrial school, it shall be the duty of the local education authority of the district in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified industrial school suitable to the case, having regard to the requirements of this Part of this Act"; and then (sub-s. 3): "For the purposes of the foregoing provisions of this section a youthful offender or child shall be presumed to reside in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place"—resided, that is to say, at the time when the offence was committed, or when the circumstances which rendered him liable to be sent to the school occurred. Now what is the meaning of those words "or the circumstances which rendered him liable to be sent to a certified school occurred"? In my opinion, singula singulis reddendo, those words refer to cases in s. 58, sub-s. 1. They are circumstances falling short of an offence—indeed upon a totally different plane from an offence which renders a boy liable to be sent to a certified industrial school. The other part of the section clearly relates to a case where an offence has been committed, and the boy is presumed to have resided at the decisive moment in that place or in the alternative case where those circumstances occurred,

unless it is proved that he resided in some other place. The respondents here contend that those words "the circumstances which rendered him liable to be sent to a certified school" are wide enough to include a case where a boy has been charged with an offence, but has been placed under probation and has afterwards failed to observe the conditions of his probation; and it is said that when in those circumstances justices proceed to deal with him because he has broken the conditions of his probation, then the circumstance which renders him liable to be sent to a certified school is that breach of the conditions, and that one is to look to the place where that breach of conditions occurred in order to see where his residence at the decisive moment was. That seems to me to confuse the clear meaning of sub-s. 3. There is a sharp contrast in that section between the committing of an offence, on the one hand, and, on the other hand, the occurring of circumstances rendering the child liable to be sent to a certified school. The breach of conditions in this case was not, and could not be, a circumstance rendering him liable to be sent to a certified school. The breach of conditions of probation, whatever else it may be, is not an offence; it is not something with which a person is charged; it is not something upon which a jury may come to a verdict. Nor does the respondents' argument derive any real support from the provisions of the Probation of Offenders Act, 1907. Sect. 1 of that Act provides that in certain cases the Court may, notwithstanding that the charge has been proved and the offence committed, without proceeding to conviction, make certain orders; and then sub-s. 5 of s. 6 provides: "A court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence or, if the case was one in which the court of the first instance might, under section fifteen of the Industrial Schools Act, 1866, have ordered the offender to be sent to a certified industrial school, and the offender is still apparently under the age of twelve years,

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make such an order." I am clearly of opinion that in that sub-section, no matter which of the two alternatives is adopted by the Court, whether it be the alternative of sentence or that of ordering the offender to a certified industrial school, what is being dealt with is the "original offence." The sub-section lends no colour to the proposition that the breach of conditions of probation is something which renders the person liable to be sent to an industrial school. I think, therefore, that on the facts of this case the only question for consideration was: Where was this boy residing at the time when the larceny which was proved against him was committed? The question where he was residing when the breach of the conditions of probation took place was entirely irrelevant. For these reasons I think that this appeal succeeds.

SANKEY J. I agree. In cases of this character in which the petty sessional Court has to determine the place of residence of a youthful offender or child, the Children Act, 1908, s. 74, sub-s. 3, prescribes the method by which the place of residence is to be ascertained. The child shall be presumed to reside in the place where (*a*) the offence was committed, or, (*b*) the circumstances which rendered him liable to be sent to a certified school occurred. In my opinion, (*b*), the second limb of those two considerations, does not apply in this case; it only applies to cases mentioned in s. 58 of the Children Act, 1908. I think, therefore, that the real question which falls for determination here is "where was the offence committed?" and that brings one to a consideration of the meaning of the word "offence" as used in the sub-section. I do not think that the breach of a recognizance such as this is an offence within the meaning of the word as used in sub-s. 3. In my view the word "offence" as there used means the circumstances or the offence which made the person in question a youthful offender; that is to say the original offence, in this case the larceny which was committed. To read the section otherwise would be to produce great difficulties. For on

that construction there would be two offences, the offence committed in Birmingham—i.e., the original larceny—and the offence committed in London, i.e., the breach of the recognizances. I entirely agree with the determination of my Lord, and think that this appeal ought to be allowed.

SALTER J. I am of the same opinion. This boy was dealt with in February, 1922, under s. 1, sub-s. 1, of the Probation of Offenders Act, 1907; and in February, 1923, under s. 6, sub-s. 5, of the same Act. I think the word "offence" in s. 74, sub-s. 3, of the Children Act, 1908, can only refer to the larceny with which this boy was charged at Birmingham in February, 1922. If the words "or the circumstances which rendered him liable to be sent to a certified school occurred" are capable of including the breach of a recognizance the "offence" would be committed in one place, and the "circumstances"—that is to say, the breach of recognizances—in another. If so, then the words "unless it is proved that he resided in some other place" would mean in some third place, neither the place where the offence was committed nor the place where the breach of recognizances occurred; and the sub-section would be rendered, in my opinion, unworkable and absurd. The words "or the circumstances which rendered him liable to be sent to a certified school" refer to s. 58 of the Act and were necessary, because sub-s. 3 of s. 74 qualifies sub-s. 2 as well as sub-s. 1. If sub-s. 3 only qualified sub-s. 1 those words would be unnecessary.

Appeal allowed.

Solicitor for appellants: *D. P. Andrews.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

F. P. F.

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Nov. 9.

THE KING *v.* SUSSEX JUSTICES.

Ex parte McCARTHY.

Justices—Possibility of Bias—Justices' Clerk present at Justices' Consultation—Justices' Clerk interested professionally in Civil Proceedings arising out of Subject Matter of Complaint.

Arising out of a collision between a motor vehicle belonging to the applicant and one belonging to W., a summons was taken out by the police against the applicant for having driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of solicitors who were acting for W. in a claim for damages against the applicant for injuries received in the collision. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted the applicant, and it was stated on affidavit that they came to that conclusion without consulting the acting clerk, who in fact abstained from referring to the case:—

Held, that the conviction must be quashed, as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

RULE NISI for a writ of certiorari to bring up, for the purpose of being quashed, a conviction of McCarthy, the applicant for the rule, for having driven a motor car on a certain highway in a manner which was dangerous to the public, having regard to all the circumstances of the case.

On August 21, 1923, a collision took place between a motor cycle driven by the applicant and a motor cycle and side-car driven by one Whitworth, and it was alleged that the latter and his wife sustained injuries in the collision. In respect of those injuries Messrs. Langham, Son & Douglas, solicitors, Hastings, by a letter dated August 28, 1923, made a claim on behalf of Whitworth against the applicant for damages, and the police, after making inquiries into the circumstances of the collision, applied for and obtained a summons against the applicant for driving his motor cycle in a manner dangerous to the public. At the hearing of that summons on September 22, 1923, the applicant's solicitor, who stated in his affidavit that he had no knowledge of the officials of the court, inquired whether Mr. F. G. Langham, the

clerk to the justices and a member of the said firm of Langham, Son & Douglas, was then sitting as clerk, and was informed that he was not, but had appointed a deputy for that day. The case was then heard, and at the conclusion of the evidence the justices retired to consider their decision, the deputy clerk retiring with them. When the justices returned into court they intimated that they had decided to convict the applicant, and they imposed a fine of 10*l.* and costs. Thereupon the applicant's solicitor brought to the notice of the justices the fact, of which he said he had only become aware when the justices retired, that the deputy clerk was a brother of Mr. F. G. Langham, and was himself a partner in the firm of Langham, Son & Douglas, and so was interested as solicitor for Whitworth in the civil proceedings arising out of the collision in respect of which they had convicted the applicant. The solicitor in his affidavit stated that had he known the above facts he would have taken the objection before the case began. This rule was thereafter obtained on the ground that it was irregular for the deputy clerk in the circumstances to retire with the justices when considering their decision.

In their affidavit the justices stated that the clerk to the justices, Mr. F. G. Langham, was on holiday at the date of the hearing and had no knowledge of the proceedings, that in his absence his brother and partner Mr. E. H. Langham acted as his deputy, that no formal objection was taken to the latter acting, that at the conclusion of the evidence the justices retired, the deputy clerk retiring with them in the usual way, taking with him the notes of the evidence in case they should be required, or in case the justices should desire to be advised upon any point of law, that in fact the justices came to their decision to convict the applicant without consulting the deputy clerk, who scrupulously abstained from referring to the case, and that the justices were not in any way biased by the fact that a member of the deputy clerk's firm had written the said letter before action. The justices added that it appeared to them that the applicant's solicitor must have had knowledge of the deputy clerk's connection

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with the firm of Langham, Son & Douglas, and that he waived any formal objection; and that if a formal objection had been taken at the commencement of the proceedings the justices would have followed their usual course in such circumstances by adjourning the hearing and requesting the clerk to arrange with one of his colleagues from a neighbouring division to act at the adjourned hearing.

Russell Davies for the justices showed cause. However undesirable it may have been in the circumstances for the deputy clerk to retire with the justices when they were considering their decision, the fact that he did so does not invalidate the conviction, seeing that he took no part in the justices' deliberations.

[LORD HEWART C.J. In a recent unreported case, this Court quashed a conviction where the chief constable, who was then prosecuting, retired with the justices.]

There it was not the duty of the chief constable to retire with the justices; here it was the duty of the deputy clerk to do so in case the justices should desire to consult him upon any point of law. If, however, there was any irregularity in the proceedings, the applicant, through his solicitor, must be taken to have waived it.

[He referred to *Reg.* v. *Brakenridge.* (1)]

W. T. Monckton for the superintendent of police, who had been served with the rule.

H. D. Samuels in support of the rule was not called upon.

LORD HEWART C.J. stated the grounds of the rule and continued: It is clear that the deputy clerk was a member of the firm of solicitors engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came

(1) (1884) 48 J. P. 293.

to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed.

LUSH J. I agree. It must be clearly understood that if justices allow their clerk to be present at their consultation when either he or his firm is professionally engaged in those proceedings or in other proceedings involving the same

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subject matter, it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices. What is objectionable is his presence at the consultation, when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice. I have no doubt that these justices did not intend to do anything irregular or wrong, but they have placed themselves in an impossible position by allowing the clerk in those circumstances to retire with them into their consultation room. The result, there being no waiver, is that the conviction must be quashed.

SANKEY J. I agree.

Rule absolute; conviction quashed.

Solicitor for applicant: *W. C. Crocker.*

Solicitors for justices: *Pettitt & Ramsay, for Langham, Son & Douglas, Hastings.*

Solicitors for police superintendent: *Taylor, Willcocks & Co., for F. Lawson Lewis, Eastbourne.*

J. S. H.

C. A.

1922

Oct. 24.

[IN THE COURT OF APPEAL.]

HESKETH *v.* BIRMINGHAM CORPORATION. (1)

Public Health—Insufficient Drainage System—Neglect of Local Authority to remedy—Injury to Property by Flooding—Non-feasance—Remedy for—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 16, 17.

The defendants, as the local authority of the district, were the owners of a sewer which ran alongside of a natural stream. In the year 1880 they made a number of storm-water outlets in the sewer to relieve the pressure on it in times of heavy rain by discharging the surplus water into the stream. At the time the outlets were made the stream was of sufficient capacity to carry off all the water that was discharged into it, but in course of time, owing to the neighbouring land having been almost entirely built over, it had become insufficient. In consequence of an exceptionally heavy storm in 1920 so much surplus water was discharged from the sewer into the stream that the adjoining land was flooded and certain houses of the plaintiff on the banks of the stream were damaged:—

Held, (1.) that under ss. 15, 16 and 17 of the Public Health Act,

(1) The reason for reporting this case, which at the time was thought only to affirm a settled rule, appears by the foot-note, p. 264, post.

1875, the defendants had statutory authority to discharge the surplus water from the sewer into the stream, and that they were not liable as for a nuisance; (2.) that the defendants' neglect to enlarge the capacity of the stream or otherwise improve their drainage system to meet the requirements of the increased population was not negligence for which an action would lie; it was a non-feasance, the remedy, if any, for which was by an application to the Local Government Board under s. 299 of the Public Health Act and assessment of compensation by arbitration under s. 308.

Hawthorn Corporation v. *Kannuluik* [1906] A. C. 105 discussed.

APPEAL from Avory J.

The plaintiff was the owner of certain houses in Villa Street, Birmingham, adjoining a certain watercourse known as Hockley Brook. The defendants are the sanitary authority for the City of Birmingham. In the year 1853 the defendants, for the better drainage of the district in which Villa Street is situate, constructed a sewer known as the Hockley main sewer, which ran alongside of the brook. To relieve the pressure on the sewer in times of heavy rain, they in 1880 constructed in the sewer a number of storm-water outlets through which the excess water in the sewer was allowed to flow into the brook. At the time that those outlets were made the capacity of the brook was sufficient to carry all the water so discharged into it from the sewer. Between that date and 1920 the whole of the land in the neighbourhood of the brook had become practically covered with houses, and the increase in the population caused a very much larger quantity of water and sewage to find its way into the sewer. The consequence was that in the event of a heavy rainfall more excess water was discharged from the sewer into the brook than the brook was capable of carrying. On August 12, 1920, there was a storm of unusual severity, the result of which was that so much water was discharged from the sewer that the brook overflowed and flooded the neighbouring land, washing away the foundations of the plaintiff's houses and causing them to be unsafe.

By s. 15 of the Birmingham Corporation (Consolidation) Act, 1883, the defendants were empowered "to widen deepen and improve . . . . Hockley Brook . . . . within the borough

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. . . . and to prevent and remove all obstructions or impediments therein or thereto." It was not disputed that the water which was allowed to flow through the sewer outlets into the brook had been to some extent contaminated with sewage, but there was no evidence to show whether or not before it entered the brook it had been freed from such impurities as would deteriorate the quality of the water in the brook. The plaintiff brought this action to recover damages for the injury, (1.) on the ground that the defendants had no statutory authority to allow water to be discharged from the sewer into the brook, and were guilty of a nuisance in doing so, and (2.) that in not widening the brook, as they were authorized to do by s. 15 of the local Act of 1883, after they knew that the brook was no longer capable of receiving the water discharged into it from the sewer, they were guilty of negligence. Avory J. held that they were liable upon both grounds, and gave judgment for the plaintiff.

The defendants appealed.

Upjohn K.C., *Montgomery K.C.* and *Birkett* for the appellants. The defendants were not liable as for a nuisance in discharging the sewer water into the brook, for they had statutory authority to do so under ss. 15, 16 and 17 of the Public Health Act, 1875. Those sections were not referred to before Avory J. By s. 15 the local authority "shall cause to be made such sewers as may be necessary for effectually draining their district." By s. 16 they may "carry any sewer . . . . into . . . . any lands whatsoever within their district"; and for that purpose the term "lands" includes land covered with water, such as a stream: per Chitty L.J., *Durrant* v. *Branksome*. (1) And by s. 17: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse . . . . until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of

(1) [1897] 2 Ch. 291, 304.

the water in such stream or watercourse." The effect of those last two sections is that the local authority have power to discharge sewage into a stream subject to the condition that they shall have first purified it, or that the quality of the stream is already so bad that it cannot be made any worse. Here there was no doubt evidence that the water in the sewer was mixed with sewage. But that is not enough to deprive the defendants of their right to discharge it into the brook. It must be such as to deteriorate the quality of the stream, and of that there was no evidence. If it had been part of the plaintiff's case that the water was foul when it left the sewer, it may be that the onus would have lain on the defendants to show that it was not foul. But that was no part of the plaintiff's case. His objection was to the volume of the water discharged, not to its impurity. The defendants would, notwithstanding their statutory powers, have been liable for damage done by their exercise if it could have been shown that they exercised them negligently: *Geddis* v. *Bann Reservoir Proprietors.* (1) But of that there was no evidence. It was not disputed that the sewer and outlets were properly constructed, or that in 1880 at the time when the outlets were made the brook was of sufficient capacity to carry off all the water sent into it from the sewer even in times of storm. And the fact that the defendants did not exercise their power of widening the brook under s. 15 of the local Act so as to bring its capacity up to the requirements of 1920 was not negligence for which an action would lie. It was a non-feasance, the only remedy for which is a complaint to the Local Government Board under s. 299 of the Public Health Act: *Pasmore* v. *Oswaldtwistle Urban Council.* (2) The real cause of the flooding here was the narrow culverts constructed by riparian owners below Villa Street, which penned the water back. But for that the defendants are not responsible.

Hurst K.C. and *Donald Hurst* for the respondent. The defendants in allowing the contents of the sewer to flow into the brook were guilty of a nuisance. They cannot justify under the statutory powers conferred by the Public

(1) (1878) 3 App. Cas. 430. (2) [1898] A. C. 387.

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Health Act, for s. 17 expressly prohibits them from doing so "*until* such sewage or filthy water is freed" from its impurities. That clearly throws the onus on the defendants, and that onus they did not discharge. Secondly they were liable for negligence in allowing the storm outlets in the sewer to continue to be used after they knew that the brook was incapable of carrying off the water that was likely to be discharged from them. In *Dent* v. *Bournemouth Corporation* (1) it was held that the diversion by a local authority of sewage from one drain into another already surcharged with sewage, whereby damage is occasioned to adjoining property, is not a mere non-feasance, but is a misfeasance for which the injured party can maintain an action. In *Hawthorn Corporation* v. *Kannuluik* (2) a municipal authority, who, under their statutory powers, took over the care of a watercourse and made it into a public drain, which proved in course of time to be increasingly insufficient to hold and pass on the sewage poured into it, with the result that the plaintiff's property was flooded thereby, were held liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose. That is exactly this case. Lord Macnaghten, delivering the judgment of the Privy Council, said: "It is difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. . . . . Nor is it enough to prove that the work done in 1889"—the time when the construction of the drain was commenced—"was sufficient at the time. It is insufficient now." (3)

(1) (1897) 66 L. J. (Q. B.) 395.

(2) [1906] A. C. 105.

(3) The facts of *Hawthorn Corporation* v. *Kannuluik*, which was an appeal from a judgment of the Supreme Court of Victoria, seem to be insufficiently set out in the report of that case in the Privy Council. The actual facts, however, upon which the judgment of the Privy Council presumably proceeded may be gathered from certain passages in the judgments of Holroyd and Hood JJ. in the Court appealed from, as reported in the Victorian Law Reports (29 V. L. R. 308). Holroyd J. said: "The main drain was constructed piecemeal, at intervals of a few years, commencing in 1888 and ending in 1896. During its construction, and since its completion, building has progressed in the vicinity, sometimes very slowly, sometimes with rapidity, to the

BANKES L.J. This is one of those cases in which the real point in dispute did not emerge in the Court below, and it is unsatisfactory to have to deal with an appeal under those conditions, because one feels that if the matter had been more fully discussed there the learned judge whose judgment is appealed from would probably have come to another decision.

The action is brought by the owner of some houses abutting on a brook running through a portion of the City of Birmingham known as the Hockley Brook, which affords the natural drain for a considerable area. The immediate neighbourhood has now been almost entirely built over, and some years ago it became necessary to construct a drainage system, for which purpose sewers were made north and south of Hockley Brook. Both those sewers had constructed in them what is very usual, and, I think, according to the evidence, absolutely necessary, that is to say, storm-water outfalls

present day..... So far back as the year 1896 at any rate the defendant has been aware that the main drain was insufficient for its work, and has not enlarged or regraded it, or improved it in any way so as to abate the recurring nuisance; but has on the contrary persisted in multiplying . . . . the subsidiary channels, whereby the happening of overflows is likely to become more frequent, and their mischievous consequences will be aggravated." And Hood J. said: "There appears to me to be nothing wrong, either in design or execution in the works"—i.e., the main drain—"that Clayton"—the defendants' engineer—"supervised. It is going too far to say that there is absence of reasonable care, calculation, and forethought because a man, in preparing a plan for an isolated drain, not part of a comprehensive scheme, does not provide for future unknown requirements, arising from an unknown use to which this drain may be turned. . . . . The plaintiff's real complaint does not arise there, but turns upon the works executed subsequently by the defendant, and the result of those works. The defendant made roads on the higher lands, and thereby concentrated and accelerated the flow of water on to the lower levels, without providing an increased discharge, and thereby injury was done to the plaintiff." He does not say precisely when the roads in question were made, but the word "subsequently" would seem to point to their having been made after the completion of the drain in 1896. If that be so the overcharging of the drain, and the consequent flooding of the plaintiff's premises in 1902, would appear to have been largely due to positive acts done by the defendant corporation, (1.) in multiplying the subsidiary channels leading into the drain, and (2.) making metalled roads with a hard and impervious surface, with full knowledge that the drain was already insufficient and that their acts would aggravate the mischief.

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which will, in case of heavy rain, allow the flood water to pass from the sewers into the brook. The course of the brook below the plaintiff's premises appears to have been much obstructed by the building operations of landowners, who have erected buildings over the brook, and have constructed culverts which have much obstructed the flow of the water, with the result that in times of heavy flood the brook has risen to such an extent as to flood portions of the adjoining properties, and in this particular case, in August, 1920, caused such a serious flooding against the plaintiff's premises that the foundations were affected and the property suffered considerable damage.

The plaintiff's case was that the acts of the defendants in discharging the overflow of the sewers into the brook without any statutory authority in that behalf amounted to a nuisance, or that the defendants were guilty of negligence in continuing to discharge the sewage into the brook after it had become of insufficient capacity to carry it in consequence of the growth of the population. No reference appears to have been made at the trial to the provisions of the Public Health Act, but after Mr. Upjohn's argument it seems plain that it is impossible to adjust the rights of these parties without reference to the provisions of that Act which are to be found in ss. 15, 16 and 17. Mr. Hurst very frankly told us that those sections were not present to his mind at the time of the trial. Sect. 15 provides that "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." Then s. 16 empowers the local authority to "carry any sewer . . . . into through or under any lands whatsoever within their district." Sect. 17 is a curious section, for it is to some extent prohibitive, and to some extent contains an implied authorization: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is

freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in any such canal pond or lake." The effect of that section has been considered in the case to which we were referred: *Durrant* v. *Branksome Urban Council.* (1) There North J. said: "I think that section recognises in the clearest way that, subject to complying with the provisions of that section, the local authority have a right to empty their drains into a natural stream or canal, pond and so on, observing, of course, the provisions of that section. It is clear from that to my mind that they may turn clean water into a stream, or what I may call cleaned water into a stream. They may even turn water that is sewage or filth into a stream if they free it from such noxious matters as would deteriorate the stream itself." And Chitty L.J. says (2): "The first part of that is prohibitory, and it is by way of proviso on something that has gone before. The second part is explanatory. I do not say that by itself it confers a power. I think the better reading is that the power is conferred by s. 16, and in this portion of the section, which says that the sewage is not to be poured in until it is freed from foul or noxious matter, the Legislature assumes it had already said something that would justify the pouring of pure water or water not fouled or noxious into the stream or canal." Therefore you find in the combination of those passages statutory authority for discharging clean or cleaned water into a stream, and if the stream itself is of such a character that the discharge of foul water into it would not affect or deteriorate the purity and quality of the water, you find statutory authority for discharging foul water. Some day an allegation that foul water has been discharged into a stream in such a way as to materially affect its quality may give rise to a serious question as to the party on whom the onus lies of showing that the case does or does not fall within the section. It is quite true that the solitary witness called for the plaintiff did refer to the liquid poured from the sewer into the brook as "storm water containing

(1) [1897] 2 Ch. 291. (2) Ibid. 305.

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sewerage," and therefore there was some evidence that might have required consideration of the provisions of the section. But Mr. Hurst made it quite plain that his complaint was not of the pouring of water into the brook which did not satisfy the requirements of s. 17, but was irrespective of the quality of the water; in other words he complained of the quantity, not of the quality. Under those circumstances it was not necessary for the defendants to call any evidence of the quality of the sewer water or of the brook, but they were entitled to rely on their statutory authority to discharge the water into the stream. Those sections of the Public Health Act were not brought to the attention of Avory J., or I feel certain that he would not have expressed himself in his judgment as he did. Under these circumstances the plaintiff was driven to contend that the defendants were guilty of negligence in permitting the storm water to flow into the brook. But the evidence before the Court was that the sewer was originally constructed as long ago as 1853, and the storm-water outfalls were made in 1880, and there was nothing in the evidence to show that at that latter date the brook was not perfectly capable of carrying off all the storm water without injury to anybody, having regard to the extent of building going on in the neighbourhood and the condition of the lower portion of the brook at that time. If it was sufficient at that time the plaintiff is in great difficulty, having regard to the cases which establish the non-liability of a local authority to an action for mere non-feasance. But apart from that I cannot see a trace of any evidence of negligence on the part of the defendants in permitting the water to pass in the way it did at the time at which it is complained of, because the plaintiff's witness did not condemn the system at all, while the defendants' witness, who was not challenged on cross-examination, said it was the only possible system. Therefore I think it was impossible for the learned judge to find that the defendants in the exercise of their statutory authority had been guilty of any negligence.

I only desire to say in conclusion a few words about two

of the authorities on which Mr. Hurst relies. The first is *Dent* v. *Bournemouth Corporation.* (1) When one looks at the facts of that case it does not seem to me to present any difficulty in the defendants' way, because there the plaintiff's claim was that the defendants had been negligent in the original construction of the drain, and also in constructing additional systems of drainage both for sewage and surface water, and connecting them with the drain with knowledge that it was incapable of carrying off the additional sewage and surface water. Presumably evidence was given to that effect, for the case was allowed to go to the jury, and upon the jury finding in the plaintiff's favour the Court held that the evidence was sufficient to support the finding. The other case, *Hawthorn Corporation* v. *Kannuluik* (2), is, as reported, difficult to reconcile with *Robinson* v. *Workington Corporation.* (3) It came on appeal from the Supreme Court of Victoria, and I can only account for the language in which Lord Macnaghten's judgment is expressed on the assumption that the question of liability for non-feasance was not material to the decision at all. Reference was there made to a Victoria Local Government Act, 1890, but the provisions of that Act are not set out in the report. It is true that counsel for the appellants there suggested that the case was one of non-feasance, and cited *Glossop's Case* (4), and all the other cases on the subject of non-feasance, but if the point had been material one can hardly understand a judge of the experience and carefulness of Lord Macnaghten treating the case as one in which the only question was whether there was evidence of negligence before the Court. He said: "Their Lordships agree with Holroyd J. The case seems to be a very simple one. The only question is, have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik?" Having regard to that language it seems impossible to treat the case as one in which either the existence of statutory authority to do the act complained of, or the question whether the facts disclosed a case of

(1) 66 L. J. (Q. B.) 395.
(2) [1906] A. C. 105, 108.
(3) [1897] 1 Q. B. 619.
(4) (1879) 12 Ch. D. 102.

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non-feasance as opposed to one of misfeasance, was really under discussion or material. For these reasons I think the appeal must be allowed.

SCRUTTON L.J. I cannot say that this case has taken a very satisfactory course. I do not gather that the learned judge below was referred to the provisions of the Public Health Act to which our attention has been called, and in the result he has not given us the benefit of his views as to their application to this case. He has also not given us his views on some of the authorities which have been cited to us, which are not very easy to reconcile, perhaps because they were not cited to him; and if it were necessary in this case to determine the dividing line between non-feasance and misfeasance by public authorities, or to give a considered view of the exact effect of s. 17 of the Public Health Act, I should personally have desired to consider my judgment. But in the view that I take of the case those questions become immaterial.

The facts proved may be very shortly stated. There was a sewer laid down by the defendants in 1853, which ran by the side of a stream called the Hockley Brook. About the year 1880 some storm outlets were made in the sewer to carry off in time of flood six times the ordinary fine-weather flow. Those storm outlets were made to enable the surplus contents of the sewer to escape. There is no evidence, as far as I can see, that at the time the sewer was constructed or those outlets were made there was any negligence in their construction or in connecting the outlets with the brook, having regard to the capacity of the sewer and brook and the needs of the district then existing. What happened was that, partly by the growth of building causing more sewage to flow into the sewer, which, of course, the defendants could not stop, and partly by the fact that those buildings and roads covering the ground prevented the rain-water from sinking in and caused it to run down what was in fact a paved way, the brook became insufficient to carry away the storm water and sewage in time of flood, and particularly

it was so because the riparian owners lower down the brook, where land was more valuable, wanted as much land as they could get for their buildings, and therefore put the brook into culverts, over which they built. As they were not working on any system, but each owner independently, they put the brook into culverts of different sizes, and under those circumstances the fact of a wide culvert being succeeded by a narrow one would be extremely likely to produce flooding. There is no doubt that by the years 1917, 1918, 1919, and 1920 the sewer and brook had become quite insufficient to carry off the storm water and the sewage. But if the system of drainage, originally sufficient, became insufficient by reason of the growth of houses, the neglect of the defendants to improve that system so as to meet the altered requirements cannot be made the subject of an action. The general rule is that a local authority is liable for misfeasance but not for non-feasance. For instance, if a road is out of repair and they repair it negligently they may be liable for any resulting damage, but if they neglect to repair it altogether they will not. It seems to me that on this point I am bound by the decision in *Robinson* v. *Workington Corporation* (1), which is only one of several decisions of this Court to the same effect. There a sewer which was originally proper became improper because a number of new houses had been built, the sewage of which drained into the sewer. The Court of Appeal held that that gave a house owner whose property was damaged by the overflow from the sewer no cause of action against the local authority who had failed to keep the sewer up to the requirements of the district. The plaintiff's only remedy was by complaint to the Local Government Board under s. 299 of the Public Health Act. Another case in which the same principle was applied is *Stretton's Derby Brewery Co.* v. *Derby Corporation* (2), where the facts were very similar to those in the present case. Romer J. held that there was no negligence in not providing a new sewage scheme. The plaintiff here eventually rested his case on two alternative claims, (1.) for negligence, and (2.) for nuisance.

(1) [1897] 1 Q. B. 619. (2) [1894] 1 Ch. 431.

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I cannot see any evidence of negligence when the sewer and outlets were constructed, and I am bound by the authority which I have cited to hold that the failure to bring the system up to date is non-feasance and gives no cause of action. The claim for nuisance, by which was apparently meant that if the work was constructed without statutory authority the defendants were liable for any damage caused by it without regard to any question of negligence, equally fails, for in the provisions of the Public Health Act, ss. 15–17, which were not cited before Avory J., the defendants had abundant authority to execute the work which they did. It may be that the water which came from the sewer was filthy and such as the defendants would not have any authority under s. 17 to discharge into the stream, but the plaintiff's counsel expressly stated that his claim was based on the volume of the water so discharged, and that no objection was taken to its quality. One authority was cited which I have a difficulty in understanding—namely, Lord Macnaghten's judgment in *Hawthorn Corporation* v. *Kannuluik*. (1) One always approaches that learned lawyer's judgments with the greatest respect, but the facts stated in the report of that case in the Privy Council appear to be almost identical with those in the English cases in which the decisions are exactly the other way, and yet Lord Macnaghten, who was well acquainted with the English decisions, does not refer to them, or appear to think that they conflict with his judgment in any way. I cannot help thinking that there must have been some provision in the colonial statute, not mentioned in the report, which prevented the English decisions from applying. But whether that be so or not, I feel bound to follow the decisions in the Court of Appeal of which *Robinson* v. *Workington Corporation* (2) is one example among many. For these reasons I agree that the appeal should be allowed.

EVE J. I am of the same opinion. It is not disputed that the plaintiff's property was seriously damaged by the accumulation of water in the Hockley Brook consequent

(1) [1906] A. C. 105. (2) [1897] 1 Q. B. 619.

upon an abnormal rainfall on August 12, 1920, nor is it denied that the volume of water collected in the brook in the neighbourhood of the plaintiff's premises was increased by water which passed out of the defendants' sewer higher up the stream by means of storm outlets in the sewer. The plaintiff's first claim is that the defendants in discharging the additional water into the already surcharged brook created an actionable nuisance rendering them liable in damages. But the discharge of the water through the storm outlets was done in the exercise of statutory powers, and for any damage which the plaintiff suffered therefrom he is, in the absence of proof that the damage resulted from a negligent exercise of those powers, without remedy by action. His only remedy, if any, in such case is to get a claim for compensation referred to arbitration under s. 308. Secondly, the plaintiff puts his claim on the ground that the defendants exercised their statutory powers in a negligent manner, but he was unable to point to any conduct on their part which could be said to amount to negligence. Therefore both his causes of action fail.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for Town Clerk, Birmingham.*

Solicitors for the respondent: *Barlow, Barlow & Lyde, for James Ore, Birmingham.*

J. F. C.

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July 2, 3, 4, 26.

[IN THE COURT OF APPEAL.]

SHRAGER *v.* BASIL DIGHTON, LIMITED, AND OTHERS.

[1922. S. 403.]

Practice—Official Referee—Referee in Rotation—Trial before another Referee—Irregularity—Waiver—Rules of the Supreme Court, Order XXXVI., *rr.* 45, 46, 47.

The distribution of business among the Official Referees is fixed by the Rules of the Supreme Court, and they have no discretion to alter it.

An action having been commenced before a judge and jury, the judge ordered it to be tried before an Official Referee under s. 14 of the Arbitration Act, 1889, and refused to refer it to any one in particular of the Official Referees. The order was produced to the clerk of the senior Official Referee under Order XXXVI., r. 46, of the Rules of the Supreme Court. The clerk in breach of r. 45 of that Order endorsed the order of reference with the name of a referee who was not the referee in rotation. The case was heard and determined by the referee whose name had been endorsed on the order. The plaintiff in the course of the hearing became aware of the irregularity, but allowed the case to proceed :—

Held, that the irregularity did not render the trial a nullity, but was one which could be waived by the parties ; and that in the circumstances it had been waived by the plaintiff.

Order of the Divisional Court affirmed on different grounds.

APPEAL from an order of a Divisional Court dated June 15, 1923, and made in the following circumstances.

The action was brought by the plaintiff against the defendants to recover damages for alleged fraudulent misrepresentations and breaches of warranty of quality and description relating to 500 pieces of furniture whereby the plaintiff alleged that he was induced to buy and pay for the whole set of 500 pieces and alternatively for each separate item thereof. He alleged that he had paid to Basil Dighton, Ld., the sum of 85,284*l.* on account of the articles in question, and he claimed this sum as damages for fraud, or breach of warranty, or as money had and received. He further alleged that these defendants were claiming from him further sums amounting to 25,000*l.*, and he claimed a declaration that he was not liable to pay these sums. The defendants denied the plaintiff's allegations and counterclaimed the 25,000*l.* After various orders for particulars had been made

a letter dated October 3, 1922, was written by the plaintiff's solicitors to the defendants' solicitors as follows: "With regard to the suggestion made by Master Jelf on the 28th ult. we are prepared to be bound by the following particulars:—

"1. None of the articles of furniture are genuine antique furniture nor of the highest class nor can any of them be properly described as 'collectors' pieces.'

"2. Apart from the description in paragraph 1 of these particulars the descriptions relied on are those in the documents sent by the defendants to the plaintiff and the articles themselves.

"3. The following are representative of the specific allegations as to individual items. . . . ." There followed ninety-six items of furniture objected to as not genuine antiques with the reasons why they were said to be spurious. No further summons or order for particulars was issued or made.

The case came on for trial before the Lord Chief Justice and a special jury on November 14, 1922. It soon became apparent that there were serious difficulties in the way of trying the case before a jury. Mr. Disturnal K.C., who was the leading counsel for the plaintiff, made two attempts to confine the case within limits which would enable a jury to deal with it. The first was by taking the point that the plaintiff's purchases, though consisting of a number of items, were really one transaction for the purchase of a collection, and that proof of fraud in respect of a few items would entitle him to a verdict and judgment in respect of all. The Lord Chief Justice ruled against this contention. Mr. Disturnal then said that if the action continued before the jury the plaintiff would content himself by relying on the ninety-six instances mentioned in the particulars of October 3, but that if the action was referred his client would insist upon his whole case as set forth in the statement of claim. On November 17 the Lord Chief Justice made an order that the action should be referred to a referee, and that if the parties did not agree upon a referee the reference should be to an Official Referee.

On November 28 upon notice by the defendants the

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parties met before the Lord Chief Justice to discuss the terms of the order of reference of November 17, a draft of which had been submitted to the parties. At that hearing the leading counsel for the defendants Dighton asked that the Lord Chief Justice should name the senior Official Referee to try the case. Counsel for the plaintiff stated that he had no instructions to agree to any referee in particular, and asked that the action should stand referred to one of the Official Referees in general terms, in which case it would be taken by one of the Official Referees in the course of rotation. The Lord Chief Justice decided that in the absence of consent it would be better to allow the Rules of the Supreme Court to operate in the ordinary way.

On December 20 the order of the Lord Chief Justice was finally drawn up in the following form: "Upon hearing," etc., "and the Court holding that the particulars of claim delivered in this action and dated October 3, 1922, relative to specific complaints were exhaustive and not representative and are binding upon the plaintiff as such exhaustive particulars in respect of the articles therein specifically referred to and that the several transactions could not be regarded as one whole but must be dealt with separately and having on November 28, 1922, heard counsel on both sides on the defendants' application to revise the draft order drawn by the associate it is ordered that the jury be discharged that Basil Dighton Ld. be joined as a defendant in this action and further that the plaintiff's claim in this action as against the defendants Basil Dighton Ld. (sued as Basil Dighton a firm) Basil Lewis Dighton and Harry Walton Lawrence save in so far as the same has been determined and also the counterclaim of the defendants Basil Dighton Ld. (sued as Basil Dighton a firm) and of Harry Walton Lawrence be tried before one of the Official Referees of the Supreme Court who shall have all the powers of certifying and amending of a Judge of the High Court of Justice and shall direct judgment to be entered and deal with the claim and counterclaims above mentioned pursuant to Order XXXVI." . . . .

On December 21 a clerk of the plaintiff's solicitors took

this order of reference to the office of the senior Official Referee in order that his clerk should endorse upon it the name of the Official Referee in rotation who according to the Rules of the Supreme Court would try the action. The clerk endorsed the order "Sir Edward Pollock is the Official Referee in rotation."

Sir Edward Pollock was not the Official Referee in rotation. The Official Referee in rotation was Mr. G. A. Scott, and the next in rotation was Sir Francis Newbolt. These facts became known to the plaintiff's advisers at the latest towards the end of the hearing before the Official Referee, but the case was allowed to proceed notwithstanding. In the opinion of the Divisional Court and of the majority of the Court of Appeal the assignment of the case to Sir Edward Pollock was a bona fide mistake on the part of Mr. Perry, the clerk, who thought that there was power in certain circumstances to depart from the course of rotation, and that the senior Official Referee had a discretion to hear a case himself if it was more convenient that he should do so. The considerations which influenced Mr. Perry were stated in an affidavit as follows: "When the matter was first called to my attention by the defendants' solicitors' clerk he said that it was desirable that the case should be tried as soon as possible as the Lord Chief Justice had suggested should be done and that for certain reasons they wished that it should not be tried before Sir Francis Newbolt K.C. At this time Mr. G. A. Scott, the other Official Referee, was unwell and quite unable to take the case and it was uncertain whether he would be able to take the case within a reasonable time, and the clerk requested me to place these facts before Sir Edward Pollock and to ask him to take the case in the interest of the parties. Accordingly I mentioned the matter to Sir Edward Pollock and he agreed to take the case. Accordingly I put it down to him in the rota."

The case was heard by Sir Edward Pollock. It commenced on January 22, occupied twenty-five days, and was concluded on February 26, 1923. The learned Official Referee construed the order of December 20 as declaring that

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the particulars given in the letter of October 3 were exhaustive, not only in so far as they related to the items therein mentioned, but as to all the 500 items specified in the statement of claim; and having so construed the order he directed that judgment should be entered for the defendants Basil Dighton, Ld. (sued as Basil Dighton, a firm), and Basil Lewis Dighton on the claim with costs, and that judgment should be entered for these defendants on the counterclaim for the sum of 18,464*l.* 16*s.* 8*d.*; and for the defendant Harry Walton Lawrence on the claim with costs and on the counterclaim for the sum of 7300*l.*

The plaintiff appealed to the Divisional Court. The grounds of appeal were (among others):—

1. That the action was not properly assigned in the manner required by Order XXXVI., r. 45, relating to the distribution of business among the Official Referees.

3. That the Official Referee was wrong in law in holding that by the order of reference of November 28, 1922, the plaintiff was bound by the particulars contained in the letter of October 3, 1922, so that he could not adduce evidence in support of his claim save as regards matters appearing in the said particulars.

The Divisional Court (Darling and Salter JJ.) decided against the plaintiff on the first ground of appeal and in his favour on the third ground; and they set aside the judgment directed to be entered for Basil Dighton, Ld., and Basil Lewis Dighton on the claim and counterclaim, and ordered that the whole matter should be remitted to the Official Referee to complete the hearing and to hear and determine every matter of complaint pleaded by the plaintiff in respect of every transaction between the parties save those matters of complaint which had already been specifically decided.

The defendants appealed from so much of this order as directed that the judgment for Basil Dighton, Ld., and Basil Lewis Dighton should be set aside. It is not thought necessary to report the judgments of the Court or the arguments of counsel upon this point.

There was a cross-appeal by the plaintiff from so much of the order of the Divisional Court as directed that the case should be remitted to Sir Edward Pollock.

Sir Harold Smith K.C., *Roland Burrows* and *J. Alan Bell* for the plaintiff contended that there was no discretion in the senior Official Referee or in any person other than the Lord Chancellor or the Lord Chief Justice to distribute cases for hearing otherwise than as prescribed by statute and by the Rules of the Supreme Court. They referred to the Judicature Act, 1873, s. 83; the Arbitration Act, 1889, s. 14, and Order XXXVI., rr. 45, 46, 47 and 47B (1), as statutory enactments conferring their jurisdiction on the Official

(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 83: "There shall be attached to the Supreme Court permanent officers, to be called Official Referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such Referees. . . . . Such Official Referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court or of the Court of Appeal." . . . .

Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14: "In any cause or matter (other than a criminal proceeding by the Crown),— . . . . (b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers . . . . the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

Rules of the Supreme Court, Order XXXVI., r. 45: "When an order is made referring any business to the official referees appointed under the principal Act"—i.e. the Judicature Act, 1873—"the order may refer such business to any one in particular of the referees; but if no particular referee is named in the order the business shall be distributed among the official referees by the clerk to the senior official referee, in rotation or in such other manner as the Lord Chancellor may from time to time direct."

Rule 46: "When an order shall have been made referring any business to the official referees, not naming any one of them in particular, the order, or a duplicate of it, shall be produced to the clerk in the last preceding rule mentioned, who shall indorse on the order the name of the official referee to whom that business is to be referred, in accordance with the last preceding rule, and the order so indorsed shall be sufficient authority for the official referee to proceed with the business so referred."

Rule 47: "When an order shall have been made referring any business to any one in particular of the official referees, the clerk in

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Referees, and insisted that an Official Referee acting otherwise than as prescribed was acting without jurisdiction, and that the parties could not confer upon an Official Referee a jurisdiction not conferred on him by statute: *Farquharson* v. *Morgan* (1); *Norwich Corporation* v. *Norwich Electric Tramways Co.* (2) There must therefore be a new trial, and it ought to take place before another Official Referee.

Sir Ernest Pollock K.C., *Jowitt K.C.* and *James Dickinson* for the defendants Basil Dighton, Ld., and Basil Lewis Dighton.

Neilson K.C. and *Claughton Scott K.C.* for the defendant Lawrence.

1. Some discretion must for the general convenience and almost of necessity be reposed in the senior Official Referee in distributing the business. Here the referee in rotation was ill. It may be very inconvenient if a referee is suddenly taken ill to keep the cases in his list waiting until the Lord Chancellor or the Lord Chief Justice can make an order altering the order of hearing.

2. Even if there is no discretion, the hearing by a referee other than the referee in rotation is not a nullity; it is not coram non judice; at most it is an irregularity which can be waived by the parties: *Taylor* v. *Roe.* (3)

3. The irregularity was waived by the plaintiff, who knew of it at the latest five days before the hearing was concluded before the Official Referee, and nevertheless allowed the case to proceed.

Burrows in reply. *Cur. adv. vult.*

July 26. Written judgments were delivered. So far as relates to the cross-appeal they were as follows:—

making the distribution of the business as by these rules directed, shall have regard to such reference."

Rule 47B: "The Lord Chancellor and the Lord Chief Justice of England, or either of them, shall have power to order the transfer of any causes or matters from any one or more of the official referees to any other or others of them whenever in his opinion it shall be expedient so to do, having regard to the state of the business pending before the referees."

(1) [1894] 1 Q. B. 552.

(2) [1906] 2 K. B. 119, 126.

(3) (1893) 68 L. T. 213.

BANKES L.J. The object of the cross-appeal is to obtain some order from this Court the effect of which will be that any further hearing of this action shall be before an Official Referee other than Sir Edward Pollock. In substance it is an application for an order for a new trial, and to that extent an appeal from so much of the order of the Divisional Court as directed the completion of the hearing of the action by Sir Edward Pollock. [The Lord Justice stated the facts and proceeded :]

The rules regulating the distribution of business among the Official Referees are rr. 45, 46, 47, 47A and 47B of Order XXXVI. It has been suggested that under these rules some discretion as to the allocation of business is vested in the clerk to the senior Official Referee or in the senior Official Referee himself. I do not agree with this suggestion. It is in my opinion clear that the duty of the clerk is mechanical merely, and that the senior Official Referee has no authority at all to interfere with that mechanical duty. No doubt a strict interpretation of the rules may sometimes result in difficulties and inconveniences. The remedy is to improve the rules, and is not to be found in disregarding them.

In the present case the crucial question for decision is as to the effect of a disregard of the rules resulting in an honest mistake in the distribution of business. Is the effect an entire lack of jurisdiction in the Official Referee who tried the action though he was not the Official Referee in rotation, or is it that an irregularity has been committed which is capable of being cured ? In the recent case of *Smythe* v. *Wiles* (1) I referred to a number of decisions bearing on this question. I need not refer to them again. In my opinion the Rules of Court relating to the distribution of business, whether among the Official Referees or the judges of the Chancery Division, are rules of procedure introduced for obviously good reasons, but they do not touch the question of jurisdiction at all. This was the view taken by Kekewich and Stirling JJ. in the case of *Taylor* v. *Roe* (2), and it is to my mind obviously the right one. It follows therefore that this Court must consider

(1) [1921] 2 K. B. 66, 75. (2) 68 L. T. 213.

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and determine the question whether at any material time the plaintiff's solicitors had notice of the irregularity, and whether they took any fresh step after knowledge of it: Order LXX., r. 2. A decision on this point involves the disagreeable necessity of deciding between the positive statement of Mr. Perry and the equally positive statement of Mr. Weir. Mr. Perry in his affidavit speaks to a conversation with Mr. Weir which, if it took place at all, must have taken place before the hearing before the Official Referee commenced. There is no alternative between accepting Mr. Perry's statement on this point and coming to a conclusion that he invented the incident for the occasion. It is impossible to take the latter view, and I accept Mr. Perry's positive statement in preference to Mr. Weir's recollection, which on this point must have failed him. Having arrived at this conclusion it necessarily follows that, having had the opportunity of taking objection to the irregularity, and having abstained from doing so, the present objection to the order of the Divisional Court which is founded on the irregularity fails. On Mr. Weir's own affidavit I should have come to the same conclusion, though not with the same degree of certainty, as Mr. Weir admits that from December 21 onwards he was suspicious that Sir Edward Pollock was not the Official Referee in rotation to try the action, and that during the hearing of the action Mr. Perry informed him that Mr. Scott was the proper Official Referee in rotation. The date when this information was given is not fixed. On February 22 Mr. Weir's clerk saw the entries in the Referees' Book and took a note of them. Even at this late date the hearing was not concluded, and in my opinion if objection to a hearing by Sir Edward Pollock was ever to be made, it ought to have been made immediately after the irregularity came to the knowledge of the plaintiff's advisers. The objection to the Divisional Court came much too late to be of any avail.

There remains only the question whether the order of the Divisional Court directing a completion of the trial by Sir Edward Pollock should be varied by directing a trial before some other referee. Such a course could only be justified

upon clear evidence of bias, or something amounting almost to misconduct on the part of Sir Edward Pollock. No such suggestion has been made, and it is impossible in my opinion to accede to the application unless some substantial ground for making it exists. Under these circumstances the cross-appeal fails and must be dismissed with costs.

ATKIN L.J., after referring to the Judicature Act, 1873, s. 83, the Arbitration Act, 1889, s. 14, and Order XXXVI., rr. 45, 46, 47, and 47B of the Rules of the Supreme Court, proceeded :—

Unless therefore the order of reference refers the business to "any one in particular of the referees," the Official Referee "to whom that business is to be referred" will be ascertained by adoption of the procedure as to rotation mentioned in rr. 45 and 46. The position of Official Referees is determined by the Judicature Act, 1873, s. 83. It seems to be reasonably plain that the Official Referees have no general jurisdiction as such, and derive their jurisdiction from the particular order referring a matter to them subject to the distribution of business in accordance with r. 45 and to the transfer of business under the order of the Lord Chancellor or the Lord Chief Justice pursuant to r. 47B from the Official Referee, to whom it is referred, to any other Official Referee.

[The Lord Justice then reviewed the facts and in the course of his judgment, after describing the proceedings on November 28 as stated above, continued :]

The Lord Chief Justice decided that in the absence of consent the better course would be to allow the rules to operate in the ordinary way. Unfortunately this expectation was strangely falsified. At this stage I think no serious criticism can be directed to the action of the parties except that it was in my view an error of judgment for the defendants to apply for the special appointment as referee of a near relative of their leading counsel, and for counsel so to apply. It seems to me inevitable that in such a case involving necessarily a protracted trial the opponents would be embarrassed and their confidence in the tribunal undermined. I have no

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Atkin L.J

doubt that both the defendants and their counsel were honestly and reasonably of opinion that the senior Official Referee was the best fitted to try the case and for that reason only sought to obtain a reference to him, but unless they obtained the wholehearted consent of the plaintiff and his advisers to that course they were, as I think, ill advised to persist. Next to the tribunal being in fact impartial is the importance of its appearing so.

[After dealing with the facts between November 28 and December 21 the Lord Justice continued :]

On December 21 the plaintiff's solicitor took the certificate to the senior Official Referee's clerk for the indorsement of the Referee in rotation according to rules. The indorsement made was that "Sir Edward Pollock is the Official Referee in rotation." It is not perhaps surprising that the plaintiff's solicitor was suspicious that the chance of the rota had given the defendants the Official Referee for whom they had continuously pressed, and he asked to see the rota book and was refused. His suspicions were in fact well founded. Sir Edward Pollock was not the Official Referee in rotation ; if the rota had been adhered to in accordance with the established practice the next Official Referee was Mr. Scott and the next Sir Francis Newbolt and the next Mr. Scott again. It is unnecessary to explain at length how this result is reached. It follows from the well-established practice of assigning in the rota to each Official Referee as it comes into the office any order of reference in which he is specially named leaving the open orders to be assigned in rotation to the Official Referees who are then left available. What happened therefore was that the clerk, Mr. Perry, put an indorsement upon the certificate which was untrue and which he knew to be untrue, and which if it came to the notice of the senior Official Referee he also in the circumstances must have known to be untrue. How this came about is explained by Mr. Perry in his affidavit. "When the matter was first called to my attention by the defendants' solicitors' clerk he said that it was desirable that the case should be tried as soon as possible as the Lord Chief Justice had suggested

that it should be done and that for certain reasons they wished that it should not be tried before Sir Francis Newbolt, K.C. At this time Mr. G. A. Scott, the other Official Referee, was unwell and quite unable to take the case and it was uncertain whether he would be able to take the case within a reasonable time and the clerk requested me to place these facts before Sir Edward Pollock and to ask him to take the case in the interest of the parties. Accordingly I mentioned the matter to Sir Edward Pollock and he agreed to take the case. Accordingly I put it down to him in the rota." It is plain that this took place after November 28, for it was not till then that the Lord Chief Justice had expressed any opinion that the case should be tried as soon as possible, "should be brought on as early as may be," and it follows therefore that this manœuvring by the defendants' solicitors' clerk was at a time when the Lord Chief Justice had decided that the order of reference was to be open and not to Sir Edward Pollock. It is also plain that it was known to the Official Referee and his clerk that the order was open, for otherwise no question as to the alleged illness of Mr. Scott and the objection to Sir Francis Newbolt would have arisen. It was pointed out to us that in fact Mr. Scott had only been absent from illness for two or three days about November 17; that on December 18 application for transfer to him and Sir Francis Newbolt had been made; and that on December 20 and on the actual morning of December 21 cases had been assigned to him on the rota by Mr. Perry in the ordinary course. It also appears that it seems sufficient for the defendants' solicitors' clerk to have intimated an objection to Sir Francis Newbolt to have that learned Official Referee passed over. And it further appears that no notice of what was taking place was given to the plaintiff either by the senior Official Referee's clerk or by the defendants; and that the clerk preferred to indorse a false statement on the certificate and refuse verification. This is called an irregularity. The Divisional Court say that Mr. Perry made a bona fide mistake. In any sense in which I understand good faith or mistake it was manifestly neither. I am not clear how far any concession of the

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plaintiff's counsel on this matter went, but in a question of the administration of justice I feel constrained to form my own judgment which is as above stated. I think that there was grave impropriety on the part of the solicitors for the defendants Dighton and of the senior Official Referee's clerk in attempting, unfortunately with success, to defeat the open order made after consideration by the Lord Chief Justice and to thwart what was under the circumstances the well founded objection of the plaintiff to trial before the senior Official Referee. To obtain by improper means a particular judge may be as bad as so to obtain a particular judgment. It sullies the stream of justice at its source. I have been anxious if I could to take the view of the facts adopted by the other members of the Court and to treat the matter as a mere irregularity, excused it may be to some extent by a bona fide desire to secure to the parties a tribunal even better than they were entitled to. I cannot bring myself to that opinion. I think that the acts complained of were a deliberate breach of an order of the Court, and of the Rules of Court regulating that order, and were an intentional interference at the instance of one party with the established procedure of the Court. Holding this opinion and in view of the unfortunate notoriety which under the circumstances I have mentioned this case has obtained, I have considered it my duty to set out the facts fully in order to explain why in my judgment the conduct of the parties concerned should be condemned and to record my own conviction that such occurrences should not be heard without censure in any Court of justice.

The question emerges what is to be the effect upon the rights of the parties? The defendants do not now dispute that the senior Official Referee should not have heard the case under the reference, but they contend that the fault was waived by the conduct of the plaintiff. That it could be waived is I think established. In ordinary cases a litigant cannot even by consent give coercive jurisdiction to a tribunal not in fact invested with it, but in the case of a reference to an Official Referee consent to a named referee authorizes an

order of reference to him; and I think that it would be too narrow a view of well established cases on jurisdiction to hold that an express consent to a referee not named in the order, given after the order and acted upon, would not preclude the consenting party from disputing the jurisdiction so submitted to. The question is whether there was such a consent here. I would not be prepared to hold the plaintiff bound by any consent not given with substantially a full knowledge of the material facts. Even if it were established that the plaintiff knew that Mr. Scott was the next referee in rotation, I should hold this insufficient. They would not know that Sir Francis Newbolt had also been passed over, and, in view of the suggestion of illness, might well have thought any objection to passing over Mr. Scott ungracious. I am not satisfied that they knew even so much before the trial, and I am not in view of his conduct prepared to accept the evidence of Mr. Perry in any respect where it is contradicted by the plaintiff's solicitor or his clerk. However suspicious the plaintiff's advisers may have been, I think that it would have been impossible for them to have acted upon their suspicions and cast doubt upon the good faith of the tribunal unless they had convincing evidence upon which to act. I conclude therefore that there was nothing in their conduct to preclude them from taking the present objection until the time arrived at which they obtained full inspection of the rota book. I think that they were then in possession of facts that justified and indeed demanded action. It was at a late stage of the trial during the final speech of leading counsel for the plaintiff. It was a hard choice to put counsel to. He would have to throw over the expense of over twenty days of trial for a plea which might even with the facts known be held to be ineffective. Nevertheless, a choice had to be made, and made promptly. No one could be found better capable of deciding boldly and wisely than the great advocate, Mr. Disturnal, who led for the plaintiff. He decided to go on before the senior Official Referee. When he had taken that decision and, with knowledge of the material facts, asked that Official Referee for judgment, his clients cannot, in my opinion,

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assert that there was no jurisdiction. The plaintiff therefore fails upon this point.

But the circumstances I have stated seem to me to have an important bearing upon the relief to be given to the plaintiff upon the point on which he succeeded, and in my opinion rightly succeeded, in the Divisional Court. After the thorough discussion which this point received in the judgments of the Divisional Court it is sufficient for me to say that I agree with them. In my judgment the order of reference as drawn up is incapable of the narrow construction put upon it by the defendants. I do not think that it would be legitimate to construe the order by considering whether it gave effect to the language used by the Lord Chief Justice in giving judgment, however relevant such a consideration would be on any application to rectify the order. I have considerable doubt whether the learned judge in giving judgment really meant the reference to be restricted as suggested, but I have no doubt as to the construction of the order. I feel bound to express my own doubt as to how it ever was possible for the Lord Chief Justice to construe the document of October 3, a voluntary offer of particulars, in such a way as to read "representative" as meaning "exclusive." It was perfectly possible to hold that the plaintiff ought to have given specific particulars in complete form and ought to be bound by them when given; but, with respect, the correct course to take would be to order such particulars, rather than to deem them to have been given when, as it appears to me, they had not. I agree that the plaintiffs are entitled to have the judgment set aside, and I think that before any rehearing they ought to give specific particulars of every defect that they rely on in every item of which they complain. The Divisional Court has ordered that the case should be remitted to the senior Official Referee to be further heard in respect of all matters which have not already been specifically decided. In any case I see the greatest uncertainty likely to arise from this order, and it is subject to this further extremely inconvenient result that after the Official Referee has completed the hearing

his original findings "specifically decided" are left open to attack in the Divisional Court. I am of opinion that the whole case should be remitted for a new trial to the Official Referee next in rotation when this order is made effective, other than the senior Official Referee. The circumstances have been so unsatisfactory that only in this way can the appearance of justice be maintained. That there will be considerable sums of money thrown away I agree, but as between the parties the fault is entirely the fault of the defendants Dighton. The original tribunal only obtained jurisdiction under circumstances upon which I have animadverted amounting to a serious impropriety. I think that the party who brought about this result should reap no reward from his efforts, and as the judgment obtained is to be set aside, I think that it is far more satisfactory to have the case tried before a tribunal to which there can be no objection. I would therefore allow the cross-appeal with costs.

YOUNGER L.J. I come now to the cross-appeal of the plaintiff. Its nature has been so clearly formulated in the judgments already delivered that I need not again detail at length the circumstances which give rise to it. I will state only the conclusions of law and of fact which have led me to the decision with reference to it at which I have arrived. First of all, upon the construction of Order XXXVI., rr. 45 and 46, I am very clearly of opinion that the assignment of this cause to the senior Official Referee was irregular. The order of reference was an open order. The senior Official Referee was not when it was presented to his clerk the Official Referee in rotation, and it was to that referee and to no other that it was the duty of Mr. Perry under the rule to assign the cause. I do not myself find the difficulty or ambiguity in the terms of the rule which impressed the Divisional Court. Its working is quite automatic. Inconvenient as the result may be, the rule takes no account of illness or other disability on the part of an Official Referee or of anything short of a vacancy in his office. Every cause

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must be assigned in rotation to each Official Referee in the order in which in the cause book there are vacant places to be filled. In the present case had the order of rotation been followed the cause would have been assigned to Mr. Scott. The next in the rota was Sir Francis Newbolt. The senior Official Referee, by reason of the large number of special orders made in his favour filling up his otherwise vacant places, stood only fourth in rotation. Now I need hardly say that no kind of imputation in this matter is made by the plaintiff upon the learned senior Official Referee, and I am glad also to add that any imputation upon Mr. Perry's honour was expressly and handsomely disclaimed by Sir Harold Smith. Accordingly I consider the case upon that footing alone. What was done was, it is true, not in accordance with the rule. It was however done by Mr. Perry under the direction of the senior Official Referee with a simple desire, as I think, thereby to secure a speedy trial of a heavy case which needed to be promptly heard. Mr. Scott may not have been actually laid aside by illness, but his state of health was clearly such that it was considerate to relieve him of so burdensome a reference ; there was no joint request for Sir Francis Newbolt, indeed the fact that there was or might be disagreement as to his name as a selected name was present to Mr. Perry's mind. With regard to the senior Official Referee there was no such disagreement known either to himself or to Mr. Perry, and a perusal of the proceedings before the Lord Chief Justice would not, as it seems to me, suggest it. It was in these circumstances that under the senior Official Referee's own direction the cause was assigned to him by Mr. Perry.

The discussion on this appeal has, I think, shown that it had perhaps never been appreciated in the Official Referees' department how rigid in this matter of assignment are the terms of the rule. In cognate matters the senior judge, whether of a Division or of a Court, unfettered by rules, exercises a wide discretion, and, as the rule makes no provision for illness or state of business or the like, it seems, perhaps naturally enough, to have been almost taken for

granted that in circumstances of difficulty or inconvenience a similar discretion remained, notwithstanding the rule, in the senior Official Referee. I do not doubt that the assumption of such a discretion has hitherto been regarded as almost a necessary convenience, and with reference to the procedure in this matter of the department, I find that in the course of the discussion at the trial of this very case the Lord Chief Justice himself observes: "I understand the ordinary course is that it be referred to the Official Referee and the learned Official Referees themselves following a certain routine make their choice and then take a particular case." The rule however permits, as I have said, of no such latitude. Assignment in strict rotation of referred causes can only be interfered with, if at all, by actual consent of the parties; it cannot be interfered with merely because such interference is not objected to.

In my judgment therefore the assignment of the cause to the Official Referee was irregular. In that respect I differ from the Divisional Court. But, carried out as it was in good faith by Mr. Perry, it was an irregularity capable of being waived by the plaintiff; and in my judgment it was effectively waived by him in such circumstances as that no objection to it is now open to him. It is not necessary that I should go at length into the evidence of this waiver. It will suffice if I refer to what strike me as its salient features. First of all I think it clear from his solicitors' letter of December 22, 1922, that from the first Messrs. Tweedie knew or ought to have known that the assignment to the senior Official Referee was not in accordance with the rule. The reference to the rule in their letter, and the fact stated by them that the assignment had been made before the order of reference was actually presented by them on behalf of the plaintiff, show this, I think, clearly enough. Their knowledge, sufficient at that early stage, became complete I think not later than January 8. I need not give at length my reasons for the clear conclusion I have formed that Mr. Perry's statement of what happened on that day is to be preferred to Mr. Weir's recollection as set forth in his affidavit sworn only

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during the hearing before us. I will only say that it appears from the correspondence that on January 5 the parties had agreed to a postponement of the hearing until January 22. Mr. Weir's recollection must therefore I think be at fault when he says that Mr. Perry's suggestion to him on January 8 was merely that he should see Sir Edward Pollock and have the earlier date for the hearing restored. How such a restoration for the first day of the sittings was at such a late date possible I cannot imagine. But moreover there is not the slightest trace in the correspondence or anywhere that either the plaintiff or any one else desired the original date of the hearing to be restored, after the arrangement for January 22 had been come to. For myself, I accept Mr. Perry's statement, not only because he makes it and because it remained so long unchallenged, but also because the plaintiff's advisers' attitude in relation to it is paralleled by their attitude in this matter throughout. Mr. Perry says this : " On the second occasion of my visit to the plaintiff's solicitors' office "—that date is now fixed as January 8—" Mr. Weir informed me that he was not satisfied that the case had been properly allotted to Sir Edward Pollock, and Mr. Evans remarked that when he saw the Rota Book on December 21, 1922, I had left a line vacant, and I then said there is no mystery about the matter, as Sir Edward Pollock had directed me to make such entry in the Rota Book. Mr. Weir then said that they had wished Sir Francis Newbolt K.C. to try the case, as he knew something about furniture. I said that you would not have had Sir F. Newbolt K.C. as Mr. Scott was the next on the rota, and this no doubt is the occasion referred to by Mr. Weir in paragraph 8 of his affidavit. I then stated that if they objected to Sir Edward Pollock trying the case the best thing they could do was to come down on the first day of the Sittings with the other side and Sir Edward Pollock would then deal with the matter, and that I was quite sure that he would not take the case if the parties objected, and there was no good in their spending a lot of money and then grumbling afterwards. Mr. Weir then said that he would leave the matter in the hands of Mr. Disturnal K.C. for him to decide. I heard no

more about the matter after that, and therefore assumed that no further objection would be taken to Sir Edward Pollock trying the case." If that statement is accepted the waiver is complete. But in fact it is equally complete even if the statement be not accepted. For it is admitted by Sir Harold Smith that certainly in the course of the hearing before the Official Referee Mr. Perry informed Mr. Weir that Mr. Scott was the Official Referee in rotation, and nevertheless—and I cannot doubt with full knowledge—Mr. Disturnal proceeded with the reference, and without a word of protest concluded it by claiming at the hand of the Official Referee an award in his favour. The conclusion to my mind is irresistible. The plaintiff with full knowledge of the irregularity which he now asserts to be fatal, without a word of objection made either to the Official Referee or to the defendant Lawrence, with no protest or objection even to the defendants Dighton after their letter of January 4, 1923, actively co-operating with Mr. Perry in arrangements for the hearing from December 29 onwards, went on with the reference and endeavoured to secure judgment in his favour. The judgment given was not in his favour, and he now, any imputation of bad faith being disclaimed, applies to have that judgment set aside on the ground only of an irregularity in the proceedings of which he was aware, I think, all through, but certainly long before they were concluded. In my judgment elementary justice requires that such an application should fail.

The conclusion is, I think, inevitable. The order of the Divisional Court should, in my judgment, stand. The merits of the judgment of the Official Referee have in no way been canvassed either before that Court or before us, and it must be to him that the cause should, I think, be referred for further hearing. If any other order were made the whole of the twenty-five days' proceedings before Sir Edward Pollock would be rendered abortive ; the enormous expenditure of time and money made in the prosecution of the enquiry before him would be wasted, and the parties would have to begin the trial of this apparently interminable dispute

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all over again. For this there is, I think, no justification presented to us.

In my judgment therefore the cross-appeal should be dismissed.

Cross-appeal dismissed.

Solicitors for plaintiff: *A. F. & R. W. Tweedie.*

Solicitors for defendants Dighton: *Downing, Middleton & Lewis, for Middleton & Co., Sunderland.*

W. H. G.

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Oct. 24;
Nov. 2.

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Revenue—Entertainments Duty—Procession in Public Street—Room and Window let to Spectator—"Place of entertainment"—"Proprietor" of Entertainment—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 2, 4, 6—*Finance Act*, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 11.

In 1922 there was held at Preston a celebration of the local guild merchant, and during a particular week several processions passed through certain streets of the town. The respondent, who was the occupier of premises in one of these streets, sublet to a spectator for the said week a window which commanded a view of that street along with the use of a room for a payment of 5*l.* as rent. On that payment no entertainments duty was paid under the Finance (New Duties) Act, 1916. The spectator was present in the said room on one of the days of the said week while a certain procession was passing the premises. It was admitted that the said procession was an "entertainment" within the meaning of that Act. An information was laid against the respondent under s. 1, sub-s. 2, of the Act charging that on the day above referred to the spectator was admitted for payment to a place of entertainment otherwise than in compliance with the Act, and that the respondent was the proprietor of the entertainment:—

Held, that the window and room were a "place of entertainment" within the meaning of the said sub-section; that the respondent was the "proprietor" of the entertainment within that sub-section as extended by s. 11 of the Finance Act, 1922; and therefore that entertainments duty was payable and that the respondent should be convicted.

CASE stated by justices for Preston.

An information was laid by George Edward Gibson (hereinafter called "the respondent") charging that on September 6, 1922, at the George Hotel, in Friargate, in the county borough of Preston, in the county of Lancaster, one William Valentine

was admitted for payment to a place of entertainment, where the payment was subject to entertainments duty, otherwise than in compliance with the Finance (New Duties) Act, 1916, s. 1 (1), contrary to that section, and that the respondent was the proprietor of the entertainment.

(1) The Finance (New Duties) Act, 1916, provides: Sect. 1: "(1.) There shall, as from the fifteenth day of May, nineteen hundred and sixteen, be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an excise duty (in this Act referred to as 'entertainments duty')" at the rate there specified.

"(2.) No person shall be admitted for payment to any entertainment where the payment is subject to entertainments duty except—

(*a*) with a ticket stamped with a stamp (not before used) denoting that the proper entertainments duty has been paid; or

(*b*) in special cases with the approval of the Commissioners, through a barrier which, or by means of a mechanical contrivance which, automatically registers the number of persons admitted,

unless the proprietor of the entertainment has made arrangements approved by the Commissioners for furnishing returns of the payments for admission to the entertainment and has given security up to an amount and in a manner approved by the Commissioners for the payment of duty.

"If any person is admitted for payment to any place of entertainment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted shall be liable in respect of each offence to an excise penalty, in the case of the person admitted of five pounds, and in the case of the proprietor of fifty pounds, and the proprietor shall in addition be liable to pay any duty which should have been paid."

"(6.) For the purpose of the provisions of this Act relating to entertainments duty—

The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held;

The expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required;

The expression 'proprietor' in relation to any entertainment includes any person responsible for the management thereof."

The Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 11: "For removing doubts, it is hereby declared that entertainments duty within the meaning of section one of the Finance

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On March 28, 1923, the information was heard by the justices, when the following facts were proved or admitted:—

In 1922 there was held at Preston a vicennial festival of the Preston guild merchant. In particular the week between September 3 and 9, 1922, both days inclusive, was celebrated as "guild week" and was made the occasion of many ceremonies and festivals.

Among the events of the guild week were several processions which passed through many of the streets of the town.

On Wednesday, September 6, 1922, there was a procession demonstrative of the miscellaneous trade and textile industries of the town.

Before and during the guild week there existed in Friargate, Preston, certain premises known as the "George Hotel," some of the windows of which commanded a view of Friargate and of such of the said processions as passed thereby.

During the guild week the respondent was in occupation of the said hotel as tenant with power to sublet.

The respondent sublet to Valentine for the guild week one of these windows and the right to use the room in which it was situate, and received therefor from Valentine 5*l.* as rent.

By virtue of the said subletting and payment Valentine had the right to use that window and the room in which that window and other windows were situate during the guild week, and to introduce friends thereto at any time for all purposes, but not to spend the night therein.

Valentine with his friends was present in that room on

(New Duties) Act, 1916, is by virtue of that Act chargeable on the following payments, that is to say:—

(*a*) payments for admission to an entertainment made to a person other than the proprietor of the entertainment; and

(*b*) payments of rent made in respect of an interest in any premises which is primarily acquired for the purpose of securing admission to an entertainment;

and accordingly in that section the expression 'the proprietor of the entertainment' and 'the proprietor' shall include and be deemed always to have included any person on whose behalf payments for admission to an entertainment are received."

September 6, 1922, for some of the time during which the above-named procession of that date was passing the hotel.

Valentine had not the exclusive user or exclusive right of user of the room in which the said window was. There were at least three windows in the room, which had been sublet by the respondent to and were occupied by other persons on terms similar to those on which Valentine occupied the space in the room used by him.

The said room was not fully furnished. The furniture therein consisted of chairs and trestle tables.

A portion of the said premises on the ground floor was occupied for the period of the guild week as a restaurant, and the top floor of the premises was reserved by the respondent for the use of himself and his friends.

The said William Valentine was not bound to and in fact did not remain in the said room for the whole of the time during which such processions as aforesaid were passing the premises. He and his friends were entitled to and did come and go to and from the room during the whole of the said week, as he and they desired. At times during the said week he viewed the processions from the street, and at other times from the said window.

Valentine resided at Lytham, which was about fourteen miles from Preston. Valentine was not admitted to the said room by a ticket stamped with a stamp denoting that entertainments duty had been paid, or otherwise, in compliance with the provisions of s. 1, sub-s. 2, of the Finance (New Duties) Act, 1916, and no entertainments duty was paid on the payment by him of the said sum of 5*l.* or any sum.

It was admitted that the people who viewed the processions from the footway along the routes did so without any charge or payment.

For the appellant it was contended that the said street procession was an "entertainment" within the meaning of s. 1, sub-s. 6, of the Act of 1916, that the payment of 5*l.* as aforesaid by Valentine was a payment for admission to an entertainment, that liability to entertainments duty attached thereto, that the respondent was the proprietor of

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the entertainment within the meaning of the said Act, and that in the foregoing circumstances an offence had been committed.

For the respondent it was contended that the said street procession was not an "entertainment," that the entertainment (if any) took place in the public street and not in the said window or room, that the entertainment (if any) was free to the public in the street without any payment, that the said hotel was not a place of entertainment, that Valentine was not admitted for payment to a place of entertainment, that no liability to entertainments duty attached to the said payment, and that no offence on the facts was committed.

The justices were of opinion upon the facts that: (*a*) the payment of the said sum of 5*l.* by Valentine to the respondent was not a payment for admission to an entertainment which was chargeable with entertainments duty under the Act of 1916, as amended by s. 11 of the Finance Act, 1922, but was a payment to enable him and his friends to be in the said room during the guild week at the times when processions were passing and at other times. (*b*) That Valentine was not admitted for payment to a place of entertainment where the payment was subject to entertainments duty, and they accordingly dismissed the information.

The question for the Court was whether or not upon the above facts the decision of the justices was correct in law.

Sir Douglas Hogg A.-G. and *W. Bowstead* for the appellant. The payment made by the spectator to the respondent as rent for the use of the window and room to enable him to view the procession on September 6, 1922, was a payment in respect of which entertainments duty should be paid under the Finance (New Duties) Act, 1916. The procession was an "entertainment" within the meaning of that term as defined in s. 1, sub-s. 6, of that Act (1), and, if the window and room were a part of the place in which the entertainment was held, then the admission of the spectator to the window

(1) See note (1) ante, p. 295.

and room was an "admission to an entertainment," and the payment made by the spectator to the respondent in respect thereof was a "payment on admission" within the meaning of that sub-section: *Attorney-General* v. *McLeod* (1) and *Cordiner* v. *Stockham*. (2) The case of *J. Lyons & Co., Ld.* v. *Fox* (3) is distinguishable, for there the payment was made for a meal, and not for the concert which constituted the entertainment. Further, if the window and room were part of the place in which the entertainment was held, the respondent was a "proprietor" of the entertainment within the meaning of the last-mentioned sub-section as extended by the Finance Act, 1922, s. 11. (4) The room and window were a part of the place in which the entertainment was held. Though the word "place" occurs in s. 1, sub-s. 6, of the Act of 1916 (4), its meaning is not there defined or limited. Premises may be part of a place of entertainment, although the actual exhibition or performance does not take place there. Private premises for the use of which a payment is made may be part of the place of entertainment, although the actual exhibition or performance occurs in a public place where people may see it without making any payment. Thus, an inclosure to which persons are admitted for payment for the purpose of obtaining a view of a boat race or an air race may be a part of the place of entertainment, although the actual contest does not take place there. It follows that, on the payment made by the spectator to the respondent, entertainments duty is payable under s. 1, sub-s. 1 (4), of the Act of 1916; and that the respondent is liable to a penalty under s. 1, sub-s. 2 (4), of that Act.

It will not be difficult to ascertain what part of the rent paid by the spectator to the respondent was paid in respect of the particular entertainment to which the information relates, and to assess the duty accordingly: *Attorney-General* v. *Swan*. (5)

Wingate-Saul K.C. and *F. G. Enness* for the respondent.

(1) [1918] 1 K. B. 13.
(2) [1920] 1 K. B. 104.
(3) [1919] 1 K. B. 11.
(4) See note (1) ante, p. 295.
(5) [1922] 1 K. B. 682.

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The payment made by the spectator to the respondent to enable him to see the procession in question was not a payment on which entertainments duty is payable under the Acts of 1916 and 1922. The procession in question was not an "entertainment" within the meaning of the Acts. The Act of 1916, s. 1, sub-s. 6 (1), the definition clause, provides in regard to that expression that it "includes any exhibition, performance, amusement, game or sport." In that clause the word "includes" is equivalent to "means and includes," and implies that the terms which follow it afford an exhaustive definition of the expression defined: see per Lord Watson in *Dilworth* v. *Commissioner of Stamps* (2), but none of these terms properly applies to the procession in question. (3) Admitting, however, that the procession was an entertainment within the meaning of the Acts, the payment made by the spectator does not come within the words "payments for admission" to an entertainment in the Act of 1916, s. 1, sub-s. 1 (1), inasmuch as these words must be understood in their ordinary sense, and applied only to cases in which there is a payment for admission to the actual place where the entertainment is being held. Here the payment for the window and room was not a payment for admission to any part of the place where the procession passed. The only provision of the Acts which could be supposed to apply to this case is s. 11 (*b*) of the Act of 1922 (1), which provides that duty is chargeable on "payments of rent made in respect of an interest in any premises which is primarily acquired for the purpose of securing admission to an entertainment." It does not appear, however, that that provision applies to the present case, because the payment in question secured to the spectator the right to use the room and window for a week during which several processions and shows passed along the street, and there is no finding by the justices that the interest in the premises in respect of which the payment was made was primarily acquired for the purpose of securing the spectator's admission to the particular procession which

(1) See note (1) ante, p. 295.

(2) [1899] A. C. 99.

(3) The contention that the procession was not an entertainment was not insisted upon.

constituted the entertainment to which the information relates. That provision is meant to apply only to such cases as those in which a payment of rent is made for the purpose of securing an interest in a part of the actual premises in which the entertainment occurs, as, for instance, a box in a theatre. Under s. 2, sub-s. 2, of the Act of 1916 an officer of the Commissioners authorized by them for that purpose may enter any "place of entertainment" with a view to seeing whether the provisions of the Act are being complied with, and under s. 2, sub-s. 4, the Commissioners may by agreement with the police authority arrange for the exercise by that authority of the powers of the Commissioners with respect to entertainments; but it cannot be intended that premises such as the room and window in question should be a place of entertainment in which these powers would be exercisable. As there is no finding that the other processions and shows which took place during the week were entertainments within the Acts, and as the spectator made a payment by means of a lump sum for the week, the Commissioners, under s. 1, sub-s. 4, of the Act of 1916, could only charge duty on such an amount as represented admission to the entertainment.

W. Bowstead in reply. The justices have in effect found that the payment was made for the purpose of securing admission to the entertainment in question, because they have found that the payment was made by the spectator for the whole week, and thus entitled him to see all the entertainments of the week, including the procession in question; and further, because they have found that the room was not fully furnished, so that it could not well have been used during the week for any purpose except that of viewing the procession. If the sum paid was paid for admission to all the entertainments during the week, and if, as is admitted, the procession in question was one of these entertainments, it is clear that part of the sum was paid for admission to view that procession. It was open to the respondent to make an application under s. 1, sub-s. 4, of the Act of 1916 for the apportionment of the sum and the ascertainment of the amount of it which related to the procession in question, and, in the absence of

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any application for that purpose by the respondent, the Commissioners were not called upon to apportion the sum, but were entitled to treat it as having been paid in respect of that procession. In considering whether the payment was made for admission to the entertainment, it is material to consider the state of mind of the spectator, who made the payment for the purpose of enabling him to see the procession in comfort from the window rather than in discomfort from the street. The room and window were a place of entertainment for the purposes of the Act.

Nov. 2. The following judgment of the Court (LORD HEWART C.J., SANKEY and SALTER JJ.) was read by

SALTER J. This is a case stated by justices, and it raises the question whether a payment for the use of a window from which to view a street procession is chargeable with entertainment duty under the provisions of the Finance (New Duties) Act, 1916, as amended by s. 11 of the Finance Act, 1922. On the facts found in the case the justices have held that the payment is not so chargeable and have dismissed the information. The question is whether they were right in law.

The Act of 1916 charges the duty "on all payments for admission to any entertainment." It is clear that the Act contemplates admission to a place from which, but for the payment, the person paying could be lawfully excluded, and the words creating the offence charged are "if any person is admitted for payment to any place of entertainment." Mr. Valentine was admitted by the respondent to the room and window for payment, and the question therefore is whether the room and window were a "place of entertainment" within the meaning of s. 1, sub-s. 2, of the Act of 1916. In cases of this kind, it will be a question to be determined in each case whether the spectacle which the person pays to see is an entertainment within the meaning of the Act. In this case it is admitted that the procession which passed the window on the day in question was an entertainment. It took place in the highway, but it does not follow that the room and window were not a "place of

entertainment." The expression "place of entertainment" is not necessarily confined to the actual spot in which the entertainment takes place. Spectators of a cricket or football match, visitors to a theatre or concert, are not admitted to the playing-field, nor to the stage, nor to the platform or orchestra. They are admitted to a place adjoining the spot where the entertainment is given, from which they can see and hear it. In our opinion, this window was, on the day in question, a place of entertainment, just as the auditorium of a theatre is a place of entertainment. A place may be a place of entertainment although it is not "a place ordinarily used as a place of entertainment": see s. 2, sub-s. 2. Nor is it in any way material that the entertainment could be seen without charge by persons standing in the street.

If, therefore, the Act of 1916 had stood alone it would have been sufficiently clear that Mr. Valentine had been, on the day in question, admitted for payment to a place of entertainment, but it might have been doubted whether the respondent could be said to be the proprietor of the entertainment to which Mr. Valentine was admitted. The penalty is imposed only on "the person admitted and the proprietor of the entertainment to which he is admitted." The Act of 1922 removes this doubt by declaring (s. 11) that the duty is chargeable on payments for admission to an entertainment made to a person other than the proprietor of the entertainment, and that the expressions in s. 1 of the Act of 1916 "the proprietor of the entertainment" and "the proprietor" shall include and be deemed always to have included any person on whose behalf payments for admission to an entertainment are received. It is therefore unnecessary to determine whether this case is within s. 11 (*b*) of the Act of 1922. The justices have found that the respondent "sublet" the window, and that the sum paid for the use of it was "rent." They have not found whether, or not, the interest in the premises was "primarily acquired for the purpose of securing admission to an entertainment." It is unnecessary to determine whether the word "rent" and "interest" in this subsection are to be construed strictly, whether the relation of

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landlord and tenant must exist, and whether Mr. Valentine acquired anything more than a licence. The complainant was entitled to succeed without recourse to the provisions of s. 11 (*b*).

On the facts found the dismissal of the information was erroneous in law, and the matter must be remitted to the justices with an instruction to convict.

Appeal allowed.

Solicitor for appellant: *Solicitor of Customs and Excise.*

Solicitors for respondent: *William Sturges & Co., for Smith, Fazackerley & Ashton, Preston.*

J. R.

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May 8, 9.

WILCOCK *v.* PINTO AND COMPANY.

Revenue—Income Tax—"Trade . . . . exercised within the United Kingdom"—Assessment of non-resident Persons in Name of Agent—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sch. D—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31.

The respondents, a firm in Egypt, used to sell their cotton in England through one K., who was established in Manchester, at prices fixed by them. K. used also to transmit applications for cotton to the respondents, who either accepted or refused them through K. If they accepted, K. used to exchange documents with the buyers, and a contract was thereby entered into. K. was free to act for others, but in fact did not do so, and the respondents were not bound to send him any business at all. The cotton was shipped c.i.f. from Egypt and was delivered direct to the purchasers, payment being by bills drawn on the purchasers and discounted abroad:—

Held, that in effect K. was broker to the respondents, and was not, therefore, exercising a trade on their behalf in the United Kingdom, and consequently, that the respondents could not be assessed through him to income tax.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on April 4, 1922, Mr. F. Kummer appealed against an assessment to income tax made on Pinto & Co. (in the name of F. Kummer) under Sch. D of the Income Tax Act, 1853 (16 & 17 Vict. c. 34),

s. 41 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), for the year ended April 5, 1918. Kummer's business consisted in acting for Pinto & Co. under the circumstances hereinafter set out. Pinto & Co. were cotton merchants in Egypt. In September, 1915, they arranged with Kummer that he should be their agent for the sale of their cotton in Manchester and be remunerated with a commission of 1 per cent. on the sales, bearing his own expenses. Pinto & Co. sold some of their cotton in Liverpool through a broker. In doing business for Pinto & Co. Kummer either (*a*) sold cotton for them, the sales being only of specified quantities cabled by them from time to time, the price and terms of which were separately fixed by them; or (*b*) Kummer obtained orders to purchase cotton, the terms of the offers being transmitted by him to Pinto & Co. for their acceptance or rejection. On receipt of instructions from them, their acceptance or rejection of the offers was carried out by Kummer making the necessary contracts or refusing the offers. Goods were shipped at Alexandria c.i.f., and Pinto & Co. received payment by bills upon the purchasers, which they drew in Alexandria and discounted with a bank there. The bills, so discounted, with a copy of the bill of lading, were forwarded by the discounting bank to the United Kingdom, and the goods were only released to the purchasers upon their discharging or making themselves responsible for the discounted bills, and they were released to the purchasers direct, not through Kummer. Kummer took no part in this stage of the transaction, and was not in any way concerned in the way in which payment was made, and was not responsible for bad debts. However, upon some occasions he had collected additional charges. He was at liberty to do other business than that of Pinto & Co., but in fact did not. The name Pinto & Co. was not displayed at his office, but appeared in his letter-paper and in the contracts. He had samples of Pinto & Co.'s cotton to show, and took them to mills to get orders, but no special goodwill attached to that cotton as distinguished from other Egyptian cotton.

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It was contended that in these circumstances Pinto & Co. did not exercise a trade in the United Kingdom.

The Commissioners upheld this contention, and discharged the assessment.

The Crown appealed.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown. The question whether the respondents exercised a trade in this country is one of fact: *Werle & Co.* v. *Colquhoun.* (1) The contracts were made in England by Pinto & Co. by their agent, Kummer—a fact which distinguishes this case from *Grainger & Son* v. *Gough* (2)—and therefore they were exercising a trade in this country: *Smidth & Co* v. *Greenwood* (3), this being the converse case. And all the other acts necessary to constitute the contract were performed in England—namely, payment when the purchasers met the drafts which had been discounted abroad, and delivery of the goods. And this was the habitual course of dealing, an additional fact to show that Pinto & Co. were exercising the trade in this country: *Erichsen* v. *Last* (4), per Brett L.J.

[*Crookston* v. *Furtado* (5) and *Macpherson & Co.* v. *Moore* (6) were also referred to.]

Latter K.C. and *Bowe* for the respondents. The respondents made no contract in the United Kingdom; they received offers and communicated acceptance or refusal through Kummer as a mere conduit pipe. Kummer had no authority to close any contract, and therefore cannot be said to have traded on the respondents' behalf. The contract was made, in effect, when the mind of Pinto & Co. was brought to bear on the transaction and the decision to accept or refuse was arrived at—namely, in Egypt—and the drawing up of the contract was a formal act done by Kummer still acting as a means of communication between the parties. Delivery was really made abroad, for this was a c.i.f. contract. And with regard to payment no significance attaches to the fact

(1) (1888) 20 Q. B. D. 753, 758.
(2) [1896] A. C. 325.
(3) [1920] 3 K. B. 275.
(4) (1881) 8 Q. B. D. 414, 418.
(5) 1911 S. C. 217.
(6) 1912 S. C. 1315.

that payment was made by London bills, for most foreign transactions are so paid for. And the circumstance that the bills were honoured in the United Kingdom merely operated to relieve the drawers, Pinto & Co., of their obligations under s. 55, sub-s. 1 (*a*), of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

[*E. Clemens Horst Co.* v. *Biddell Bros.* (1) and the judgment of Kennedy L.J. in the Court of Appeal (2) were referred to.]

The case of *Crookston* v. *Furtado* (3) is relied on. In that case the agents in the United Kingdom of a French company concluded contracts on their behalf; nevertheless it was held that the company did not exercise any trade in the United Kingdom. Kummer was acting as broker to Pinto & Co. only, and by s. 31, sub-s. 6, of the Finance (No. 2) Act, 1915, his employment did not render them chargeable in his name either as a broker or as an "authorized person," which means a person clothed with some general authority, which Kummer did not have.

Hills in reply. The decisive test is where the profits were made, and in this case they were made by selling goods in the English market. The getting orders is the business, and the making of the contracts is only technical. *Grainger* v. *Gough* (4) was a very technical decision. In order to constitute an agent it is not necessary that he should have unlimited authority; in all the cases there is an obligation to refer back to the principal abroad—e.g., *Macpherson & Co.* v. *Moore.* (5)

[*Turner* v. *Rickman* (6) was also referred to.]

ROWLATT J. This case is an extremely important one, and I wish to say that I am very much indebted to the learned counsel on both sides, whose arguments have afforded a real contribution to the elucidation of a very difficult subject.

The case arises in this way. One Kummer has been assessed as the agent of Pinto & Co., a firm established in Egypt,

(1) [1912] A. C. 18.
(2) [1911] 1 K. B. 934, 952.
(3) 1911 S. C. 217.
(4) [1896] A. C. 325.
(5) 1912 S. C. 1315.
(6) (1898) 4 Tax Cas. 25.

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in respect of profits said to have been made in the exercise of a trade, through Kummer, in the United Kingdom. What Kummer, who is in Manchester, does for Pinto & Co. is this. He either sells cotton for them and takes their instructions as to prices fixed for the various qualities, or he obtains offers for the purchase of cotton the terms of which are submitted to them for their decision as to acceptance. That is to say, either Pinto & Co. tell him what cotton they are offering and he tries to find a buyer, or buyers make offers to him to buy cotton and he asks Pinto & Co. if they can or will supply these buyers. In either case, if the bargain is carried through, Kummer exchanges documents with the buyers, and makes thereby a contract in England on behalf of Pinto & Co.

A letter to Kummer from Pinto & Co. was given in evidence, in which they said that they were pleased to confirm him in the position of their agent. He is paid a commission of 1 per cent. on each sale, and he does not appear to have any permanent employment by Pinto & Co. The latter were not obliged to send him any business if they did not wish to, and could not be restrained by him from sending business elsewhere. But, using a loose expression, he is Pinto & Co.'s broker, just as one speaks of one's doctor or solicitor. Nevertheless the transactions in which they are employed are not continuous, although Kummer is said not to act for any one else.

When the documents have been exchanged it becomes the duty of Pinto & Co. to ship the goods c.i.f.; they draw a three-months' bill on the purchaser, which is payable in England, where the buyer is to accept it, and they discount it abroad. Kummer has nothing more to do with the transaction after he has fixed the contract, and it seems to me that however permanent, from a practical point of view, Kummer's business for Pinto & Co. may be, the services he renders and the part he plays in furthering their transactions and the relation he bears to them are merely those of a broker in Manchester.

Under these circumstances the Crown contends that

Pinto & Co. were exercising a trade within the United Kingdom. I am bound to say that my instinct rebels against that conclusion. It seems to me, looking at it for a moment apart from the cases, that if ever persons could be described as trading with the United Kingdom as opposed to trading in the United Kingdom, Pinto & Co., in respect of these transactions, could be so described. They are only finding their customers here through a person who exercises the functions of a broker on the spot, and the circumstance that the acts which finally make the contract are done in the United Kingdom do not seem to me to constitute the carrying on of trade in this country any more than Pinto & Co. would have carried on trade in this country if they had found it convenient to write letters in Egypt to persons in Manchester, and so to arrange a contract with them by post. It seems to me that the intervention of a broker does not make any difference from that point of view. That is how it strikes me at first sight.

I will turn now to the authorities. The Crown has taken the line that if contracts are made in this country in the sense that the acts by which the contracts are formed are done in this country, then the trade is exercised in this country. Mr. Latter for the respondents argued that when those words are used they do not mean that the making of the contract is the physical exchange of the documents, but the substantial making of the contract in the sense that the decision to exchange those documents as a matter of business management must be made in this country, and he pointed out that in *Grainger & Son* v. *Gough* (1) the invoice was apparently sent from the German firm to the British representative and by him communicated to the buyer (2), so that if the test in that case had been the actual interchange of documents the contract might be said to have been made in this country. Mr. Hills for the Crown with some justice challenged the importance Mr. Latter attached to that fact in the case.

When one looks at the case of *Macpherson & Co.* v. *Moore* (3)

(1) [1896] A. C. 325. (2) Ibid. 328. (3) 1912 S. C. 1315.

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one must realize that the circumstance that the foreign house is referred to for its decision before a contract is made does not of itself mean that the substantial making of the contract is to be referred to the foreign place where the consent is deliberated on. Therefore I do not make my decision turn at all upon the question of reference abroad as limiting the locality of the place of the contract when it is actually physically made here.

Now I come to the real crux of the case. The argument has been put relentlessly on the case of *Smidth & Co.* v. *Greenwood.* (1) In that case a Danish firm had a branch office in this country with a representative who was engaged in promoting their transactions here, their business being to supply certain machinery, and there was technical assistance given to would-be buyers both before and after the making of the contracts; and it was held that this did not constitute the exercise of a trade in this country, the ground being that the contracts were made abroad. Now Mr. Hills for the Crown turns that round and says that the complete converse holds good, that if a contract is made here the trade must be exercised here. It is not enough to show only that there is something in the nature of a branch office or an agent here if the contracts are not made here but abroad; the trade is still carried on abroad. But I think that it cannot be laid down that whenever a contract is made in England trade is necessarily exercised here, and this case turns upon the circumstance that the services rendered by Kummer and the part which he plays are nothing more or less than those of a broker in the market. What Pinto & Co. did here was merely to have recourse to this market through the machinery which this market afforded, and in these circumstances they did not exercise a trade within the United Kingdom. The decision of the Commissioners will be confirmed, and the appeal dismissed.

Appeal dismissed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Pritchard, Englefield & Co., for Boote, Edgar & Rylands, Manchester.*

(1) [1920] 3 K. B. 275.

W. L. L. B.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
1923
Oct. 22.

THE KING *v.* EDWARD FITZGERALD, DUKE OF LEINSTER.

Criminal Law—Bankrupt obtaining Credit without Disclosure—Nature of Offence—Absolute Provision—Immateriality of Absence of mens rea—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 155 (*a*).

Sect. 155 (*a*) of the Bankruptcy Act, 1914, which enacts that: "Where an undischarged bankrupt . . . . obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt . . . . he shall be guilty of a misdemeanour," is an absolute provision and is not limited to cases in which the undischarged bankrupt knowingly or intentionally obtains the credit without giving the information mentioned.

Consequently, it is no defence to a prosecution under the provision that the defendant before obtaining the credit instructed his agent to inform the person giving the credit that he was an undischarged bankrupt and had reasonable ground for believing that the agent had done so.

APPEAL against conviction.

On May 2, 1919, Edward Fitzgerald, Duke of Leinster (hereinafter called "the defendant"), was adjudicated bankrupt, and at the time of the occurrences hereinafter mentioned he remained an undischarged bankrupt. The defendant employed one James Fraser to act as his secretary. Fraser was acquainted with one Thomas Henry Webb, who knew a Mr. F. Wood, the representative and agent at Burnley of Messrs. Straker-Squire, Ld., motor-car manufacturers. On October 4, 1922, Webb introduced Wood to Fraser as the secretary of the defendant, and negotiations took place with a view to the purchase by the defendant from Straker-Squire, Ld., of two of their motor cars, Fraser eventually taking with him for the defendant's signature an order for the cars, for which the defendant was to give two bills payable six months after date, leaving a balance of 725*l.* to be paid on the delivery of the second car. On the following day the order was signed by the defendant, and was handed to Wood, who had obtained permission from Straker-Squire, Ld., to carry out the arrangement. On October 7, 1922, one of the cars was taken to King's Cross Station by S. Beeby the

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services manager of the company, and a meeting took place there between Fraser, Webb, Wood and Beeby. The defendant then appeared, and after he had signed the bills and handed them to Wood, he and Fraser drove away together in the car.

In respect of the transaction, the defendant, Fraser and Webb were afterwards charged on an indictment containing six counts, the first five of which alleged that the persons charged had committed the offences of obtaining goods by false pretences, attempting to obtain goods by false pretences, conspiracy to defraud, conspiracy to obtain credit contrary to the Debtors Act, 1869 (32 & 33 Vict. c. 62), and obtaining credit by the defendant as principal and the others as accessories contrary to the Bankruptcy Act, 1914, s. 156 (*a*); and the sixth count of which alleged that the defendant being an undischarged bankrupt obtained credit contrary to the Act of 1914, s. 155 (*a*). (1)

In June and July, 1923, the case was tried at the Central Criminal Court before the Recorder of London and a jury.

On the trial of the first five counts the defendant was found not guilty.

The trial of the defendant on the sixth count was then proceeded with. On behalf of the prosecution evidence was given with a view to showing that neither at nor before the time when the defendant bought the car and obtained credit as aforesaid, had Straker-Squire, Ld., or any one on their behalf been informed that he was an undischarged bankrupt. On behalf of the defendant evidence was given by the

(1) The Bankruptcy Act, 1914, provides:—

Sect. 155: "Where an undischarged bankrupt—

"(*a*) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt; or

"(*b*) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt;

he shall be guilty of a misdemeanour."

defendant himself and otherwise to the effect that before he bought the car or obtained credit he instructed Fraser to inform the company and their representatives that he was an undischarged bankrupt, and that he believed that Fraser had done this before the credit had been obtained.

The learned Recorder, after summing up the case to the jury, left to them the following questions, to which they returned the following answers :—

1. Q.—Did defendant obtain credit from Straker-Squire, Ld.? A.—Yes.

2. Q.—Did defendant inform them or their agent (Mr. Wood) that he was an undischarged bankrupt? A.—No.

3. Q.—Did Straker-Squire, Ld., or their said agent in fact know before giving credit to defendant that he was an undischarged bankrupt? A.—Jury disagree.

4. Q.—Did defendant know that Straker-Squire, Ld., or their said agent were or was in possession of such knowledge if any? A.—No.

5. Q.—Did defendant instruct Fraser to inform Straker-Squire, Ld., or their said agent that he was an undischarged bankrupt? A.—Yes.

6. Q.—Did Fraser so inform them or their said agent? A.—No.

7. Q.—If no, did defendant on reasonable grounds believe that Fraser had so informed them or their said agent? A.—Yes.

On these findings the defendant was convicted of the said offence and was bound over.

The defendant appealed on the grounds (inter alia) that the judge upon the findings of the jury was wrong in directing that they should record a verdict of guilty, and that the answers of the jury to questions 5 and 7 entitled the defendant to a verdict of not guilty.

Sir E. Marshall Hall K.C. and *St. John Hutchinson* for the defendant, appellant. On the answers given by the jury to the questions put to them the defendant should have been found not guilty. The provision in question—namely,

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s. 155 (*a*), of the Bankruptcy Act, 1914 (1)—creates a complete criminal offence, and not a quasi-criminal offence. The offence is described as a misdemeanour, and it is punishable by two years' imprisonment. A complete criminal offence, as distinguished from a quasi-criminal offence, involves mens rea, and can only be committed by a person who acts knowingly, intentionally or fraudulently: see *Reg.* v. *Tolson* (2); *Sherras* v. *De Rutzen* (3); *Toppin* v. *Marcus* (4); *Mousell Brothers* v. *London and North Western Ry. Co.* (5); and *Stonehouse* v. *Masson* (6), per Shearman J. That being so, the defendant could not properly be convicted of an offence under this provision, because he did not knowingly or intentionally contravene it. On the contrary he intended and endeavoured to comply with it. The jury have found that before the defendant obtained the credit he instructed his secretary to inform the persons giving the credit that he was an undischarged bankrupt, and they have further found that on reasonable grounds he believed that his secretary had done so. If the defendant had written and addressed to the persons giving the credit a letter stating that he was an undischarged bankrupt, and had entrusted it to the post office as his agent to be delivered to these persons, it could not be said that he had offended against the provision, and neither can it be said that he has done so here. The appeal should be allowed and the conviction quashed.

Cecil Whiteley K.C. and *J. P. Valetta* for the Crown were not called upon to argue.

The judgment of the Court (LORD HEWART, C.J., SANKEY and SALTER, JJ.) was delivered by

LORD HEWART C.J., who, having stated the facts and read the questions to the jury and their answers thereto, continued as follows: If these various answers be taken together they come to this, that whether Straker-Squire, Ld., knew or did not know, before they gave credit to the defendant, that he was an undischarged bankrupt—a question

(1) See note (1) ante, p. 312.
(2) (1889) 23 Q. B. D. 168.
(3) [1895] 1 Q. B. 918.
(4) [1908] 2 I. R. 423.
(5) [1917] 2 K. B. 836.
(6) [1921] 2 K. B. 818.

upon which the jury were not agreed—it is certain that neither the defendant himself nor any agent on his behalf had ever informed them that he was an undischarged bankrupt, although he had instructed an agent to inform them of the fact and believed on reasonable grounds that the agent had done so. To the question whether the defendant in fact informed Straker-Squire, Ld., either directly or through their agent, of his position, the answer is that he did not. To the further questions whether the defendant intended to inform Straker-Squire, Ld., that he was an undischarged bankrupt, instructed his agent to inform them of the fact, and on reasonable grounds believed that the agent had done so, the answers are in the affirmative. The findings of the jury therefore send one to the statute in question, the Bankruptcy Act, 1914, s. 155 (*a*) (1), in order to ascertain the nature of the offence with which the defendant is charged. Our attention has been directed to *Sherras* v. *De Rutzen* (2); *Mousell Brothers* v. *London and North Western Ry. Co.* (3); and other analogous cases. In every case of this kind it is necessary to consider the words of the statute and also its object and purpose. The words of s. 155 (*a*) of the Act of 1914 seem to be plain and unambiguous. It is clear that if that sub-section had been intended to bear a meaning other than that which it appears at first sight to express, it might easily have been differently worded. It might have been made to state that an undischarged bankrupt should not knowingly, or wilfully, or fraudulently act in the way mentioned. The sub-section, however, does not so provide. It says: "Where an undischarged bankrupt . . . . obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt . . . . he shall be guilty of a misdemeanour." The provision therefore by its express terms imposes an absolute obligation upon an undischarged bankrupt who obtains credit to give the information regarding his position. Moreover, to read the sub-section otherwise would be inconsistent with its object and

(1) See note (1) ante, p. 312. (2) [1895] 1 Q. B. 918.
(3) [1917] 2 K. B. 836.

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purpose and would make it to a great extent nugatory. The object of the sub-section is to protect the person from whom the bankrupt seeks to obtain the credit. That person is not protected unless disclosure is actually made to him of the fact that the person obtaining the credit is an undischarged bankrupt. The provision would be of practically no avail if its express directions were not carried out. Accordingly, whether one has regard to the terms of the sub-section or to its intention and purpose, one finds that it imposes an absolute obligation to give the information referred to. It is not enough that the undischarged bankrupt should show that he sought through an agent to give the information, and that he believed on reasonable grounds that it had been given. The disclosure must be made in fact to the person giving the credit, and if the credit be obtained without disclosure having in fact been made to that person, then, whatever may have been the state of mind of the undischarged bankrupt, the offence is committed.

Where it has been found by the jury that the undischarged bankrupt took steps to give the information and had reason to believe that these steps were effective, that, no doubt, is matter which may well be taken into account in assessing the punishment to be imposed, but it has no bearing on the question whether or not the offence has been committed.

The questions to be asked under the sub-section are very simple: Was the defendant an undischarged bankrupt? Did he obtain credit to the extent of 10*l.* or upwards? Did he in fact inform the person from whom he obtained the credit that he was an undischarged bankrupt? Where, as in the present case, the answers to the first two questions are in the affirmative, and the answer to the third question is in the negative, the offence is committed.

Appeal dismissed.

Solicitors for appellant: *Appleton & Co.*
Solicitor for Crown: *Director of Public Prosecutions.*

J. R.

PULLING *v.* LIDBETTER, LIMITED.

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Nov. 22.

Feeding Stuffs—Sale—Warranty—Food for Cattle—Bakery Sweepings—Pigs—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-ss.* 2, 3 *and* 4.

By the Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 4, on the sale of any article for use as food for cattle or poultry, there is implied a warranty by the seller that the article is suitable to be used as such :—

Held, that this sub-section is to be read without reference to sub-ss. 2 and 3 of s. 1, and that the words "any article" in sub-s. 4 are not confined to "any article artificially prepared" and "any article sold under a name or description implying that it is prepared from any particular substance," which are dealt with in sub-ss. 2 and 3 respectively.

APPEAL from Brighton County Court.

The plaintiff claimed damages for the loss of four pigs, alleged to have died as the result of being fed on food sold to him by the defendants, who were bakers, carrying on business in Brighton.

The facts were that in September, 1922, the plaintiff, a pig keeper, saw the defendants' managing director, who offered the bakery sweepings to the plaintiff as pig food at 2*s.* 6*d.* a bag. The plaintiff agreed, and sent to Brighton for them every fortnight from that time until January, 1923, taking sometimes two and sometimes three bags. The sweepings consisted of the ingredients used in making bread, together with dust and dirt and other odds and ends.

The plaintiff fed five pigs with this food throughout these four months, but in January, 1923, the pigs became ill and four of them died.

The county court judge found that the pigs died from salt poisoning caused by their eating the bakery sweepings, which contained an excessive proportion of salt; and that the defendants through their managing director offered and sold the sweepings to the plaintiff for the purpose of being used as pig food. Upon these findings he held that no warranty was implied by virtue of the Sale of Goods Act, 1893, s. 14, sub-s. 1, and that the plaintiff could not succeed under that Act. He held, however, that the sweepings were an article sold "for use as food for cattle," and that the

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defendants had committed a breach of warranty implied on such sale by s. 1, sub-s. 4 (1), of the Fertilisers and Feeding Stuffs Act, 1906, and he assessed the damages at 20*l*.

The defendants appealed on the ground that the county court judge was wrong in law in holding that s. 1, sub-s. 4, of the Fertilisers and Feeding Stuffs Act, 1906, applied to this food.

John Flowers for the defendants. No warranty is here implied on the part of the seller. The Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 4, must be read in conjunction with sub-ss. 2 and 3 (1), and applies only to food "artificially prepared" (sub-s. 2) or to "food sold under a name or description implying that it is prepared from any particular substance" (sub-s. 3). To an article such as bakery sweepings such words have no application, and the requirement of an invoice under s. 1, sub-s. 2, or the right of analysis under s. 3, sub-s. 1, would be ridiculous in such a case. The words of the title of the Act "Feeding Stuffs" show that "prepared

(1) Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 2: "Every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating the name of the article, and whether it has been prepared from one substance or seed or from more than one substance or seed, and in the case of any article artificially prepared otherwise than by being mixed, broken, ground or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article, and the invoice shall have effect as a warranty by the seller as to the facts so stated, except that as respects percentages the invoice shall have effect as a warranty only that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

Sub-s. 3: "Where any article sold for use as food for cattle or poultry is sold under a name or description implying that it is prepared from any particular substance or from any two or more particular substances, or the product of any particular seed or of any two or more particular seeds, and without indication that it is mixed or compounded with any other substance or seed, there shall be implied a warranty by the seller that it is pure, that is to say, is prepared from that substance or those substances only, or is a product of that seed or those seeds only."

Sub-s. 4: "On the sale of any article for use as food for cattle or poultry, there shall be implied a warranty by the seller that the article is suitable to be used as such."

Sect. 10: "For the purposes of this Act the expression 'cattle' shall mean . . . . swine."

foods" are the real subject of the Act, and that it was not directed to odds and ends which might serve as cattle food, such as were sold in the present case. Failure to give an invoice by s. 6, sub-s. 1, renders the seller liable to conviction and fine; such a consequence cannot have been intended by the Legislature upon a sale of articles of this kind.

Merlin (*Graham Mould* with him) for the plaintiff. The Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 4, stands by itself. If it were intended to be read in conjunction with sub-ss. 2 and 3, the words "any such article" would have been used, and not "any article." No invoice was here necessary, inasmuch as these "sweepings," being "mixed," form one of the express exceptions in s. 1, sub-s. 2, of the Act. The preparation here was not by art but by accident. Here sub-s. 4 applies and a warranty is implied. The seller can always protect himself by saying that he does not sell for use as food; but the county court judge has here found that the article was sold for use as food for pigs. Sub-s. 4 is wider in terms than the other sub-sections, and its object was to bring in those articles sold as food for cattle which were not covered by sub-ss. 2 and 3.

SANKEY J. The ground of appeal here is that the county court judge was wrong in holding that the Fertilisers and Feeding Stuffs Act, s. 1, sub-s. 4, applies to "bakery sweepings." The question is a short one, but it is one of some difficulty and apparently is devoid of authority; for the one case cited to us—*Anderson* v. *Daniel* (1)—has little bearing upon it. Sect. 1, sub-s. 4, of the Act provides: "On the sale of any article for use as food for cattle or poultry, there shall be implied a warranty by the seller that the article is suitable to be sold as such." Counsel for the defendants says rightly that if that sub-section stood alone it is so wide and unlimited in character that he could scarcely contend that the county court judge was wrong. He says, however, that it should be read in collocation with other sub-sections of the Act, and that when this is done it is plain that the

(1) Ante, p. 138.

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words "Any article for use as food" cannot be construed in the extended sense given to them by the county court judge, but that some limitation must be placed upon them. He points to various sections of the Act as showing that while the sweepings are in one sense of an artificial character, they are not the sort of article which is within the purview of the Act. The title of the Act is an Act "To amend the law with respect to the sale of agricultural fertilisers and feeding stuffs," and it is argued for the defendants that this does not include articles such as bakery sweepings. The answer to this probably is that sometimes the provisions of Acts of Parliament go beyond their title. Reference was made to s. 6 as to the need of an invoice and the penalty imposed for non-compliance, and it was said that it would be absurd that a person who sold bakery sweepings should be liable to prosecution for not giving an invoice, and that the section must refer to artificially prepared stuff only. The answer is that the object of the Act was to ensure that cattle and poultry, as therein defined, should obtain good and proper food, and I am not sure how far it is incumbent upon us to cut down beneficent sections leading to that result. The argument for the defendants, based upon s. 1, was that sub-s. 1 refers only to fertilisers, sub-s. 2 to artificially prepared articles, and sub-s. 3 to articles sold under a name or description implying that they are prepared from any particular substance, and that having regard to these sub-sections, we ought to place a limited construction on sub-s. 4. I cannot agree with that contention. Sub-s. 4 does not say "on the sale of any 'such' articles as food for cattle or poultry," which would apply to the articles enumerated in sub-ss. 2 and 3, and it is not possible to say that those sub-sections cut down the meaning of "article" in sub-s. 4. Unless the words of sub-s. 4 can be cut down by a consideration of other sections of the Act I am unable to see that the county court judge was wrong. Those words are of the widest possible character, and I do not think that there is anything either in the title of the Act or in the other sections to indicate that the Legislature meant that the word "article" in

sub-s. 4 should have the restricted meaning contended for by the defendants. In my view the county court judge was right and the appeal must be dismissed.

TALBOT J. I have come to the same conclusion. There is no dispute that the words of s. 1, sub-s. 4, of the Act are wide enough to cover these bakery sweepings, and it is clear that the construction represented by the judgment of the county court judge gives effect to the purpose of the Act, because it affords protection to the owners of cattle or poultry against the sale of any article for use as cattle or poultry food which is unfit for that purpose. But it was said that the scope of the Act generally, its title, and certain sections in particular, make it impossible to give to s. 1, sub-s. 4, the wide construction which its language would otherwise bear. Sect. 1, sub-s. 2, begins: "Every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice . . . . "; and it was said that it would be impossible or at least absurd to require an invoice such as is there contemplated, in the case of sweepings of this character. For my part I do not think that sub-s. 2 applies to such an article as this at all. It refers, I think, to any article which has been artificially prepared for use as food for cattle or poultry. But even if that is not so, I do not think that a heap of sweepings can be said to be an article artificially prepared merely because it consists of the refuse of bread and odds and ends which are not in a state of nature. Some support is lent to the view I am taking by a comparison with the language of sub-s. 1, which is "any article which has been subjected to any artificial process in the United Kingdom." We were referred to s. 3, sub-s. 1, which provides: "Every purchaser of any article used for fertilising the soil or as food for cattle or poultry who has taken a sample thereof within ten days after delivery of the article to him or receipt of the invoice by him, whichever is later, shall on payment of the required fee, be entitled to have the sample analysed by the agricultural analyst." It may be true that

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a purchaser of bakery sweepings is not likely to go through that process, but at most the section gives him the option to do so, if he thinks it worth while to pay the analyst's fee. At first sight s. 6, sub-s. 1, lends support to the argument for the defendants. It is a sub-section which provides that if any person who sells any article as food for cattle fails without excuse to give the invoice required, he shall be liable on summary conviction to a penalty, and it was said that not only would the consequence be, if this judgment were confirmed, that the seller could not recover the price of the goods delivered, but also that he would be liable to conviction and fine for not giving the invoice. On a closer inspection of the section, however, it appears that the same argument has already been raised on s. 1, sub-s. 2, because the failure to give the invoice must be the failure to give the "invoice required by this Act," and if I am right in thinking that the Act does not require an invoice in the case of articles of this kind, then no penalty is imposed by the Act for not giving it.

Some support is given to the plaintiff's case by the decision of the Court of Appeal in *Anderson* v. *Daniel* (1), which although not directly in point does decide that the fact that it is commercially impossible to give the invoice which is required by the terms of the Act does not prevent the contract from being avoided for the lack of it. No sufficient reason has been shown for cutting down the apparent meaning of s. 1, sub-s. 4, and I agree that the judgment of the county court judge was right.

Appeal dismissed.

Solicitors for defendants: *Graham-Hooper & Betteridge, Brighton.*

Solicitors for plaintiff: *Griffith, Smith, Wade & Riley.*

(1) Ante, p. 138.

F. P. F.

[IN THE COURT OF APPEAL.]

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Nov. 20, 21.

PICKLES *v.* FOULSHAM.

Revenue—Income Tax—Income from "possession" out of the United Kingdom—Earnings from Employment Abroad—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

The appellant was employed abroad for nearly the whole of each year under a contract of service with an English company and was paid a salary and commission, the amount of salary and commission being paid into a banking account in this country. The Special Commissioners of Income Tax assessed him under Sch. D, Case V., of the Income Tax Act, 1918, on his earnings under his contract as in respect of a possession out of the United Kingdom:—

Held, by the Court of Appeal, affirming the decision of Rowlatt J. [1923] 2 K. B. 413, that the appellant had not, under his contract, anything in the nature of a "possession" within the meaning of that expression in Case V., and he was therefore not liable to be assessed under that case; and, further, that in the circumstances, assuming that the Court had jurisdiction to amend the assessment or to send it back to the Special Commissioners, this was not a case in which that course ought to be taken.

APPEAL from the decision of Rowlatt J. upon a case stated by Special Commissioners of Income Tax. (1)

The appellant Pickles appealed against an assessment to income tax in the sum of 500*l.* for the year ending April 5, 1920, made upon him by the General Commissioners. The assessment was made under Sch. D of the Income Tax Act, 1918, in respect of the appellant's possession out of the United Kingdom—namely, his earnings from his employment in West Africa under the after-mentioned agreement. The representative of the Crown stated that the tax was charged under Case V. of Sch. D, which imposes a "tax in respect of income arising from possessions out of the United Kingdom."

The appellant had been for many years in the employ of the African Association, Ld., now the African and Eastern Trade Corporation, Ld. (hereinafter called "the company"), under agreements which had been renewed from time to time, and in pursuance of these agreements he had for many years past spent the greater part of his time in West Africa.

(1) [1923] 2 K. B. 413.

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Under the agreement in operation at the material time the appellant agreed to serve the company for a period of two years in West Africa as district supervising agent. He was to spend nine months of each year in the execution of his duties in Africa, and the six months' interval between the two periods of nine months was to represent time occupied in voyaging from and to Africa and on furlough. The company was to pay the appellant a salary of 500*l.* per annum while in Africa and voyaging and also for his board and other necessary expenses. While at home the company was to pay him a salary at the rate of 750*l.* per annum. The company also agreed to pay him a certain commission, the minimum commission being 500*l.* Payment of the commission was to be made to the appellant through the company's office in Liverpool only. Clause 11 of the agreement was as follows: "Nothing herein contained shall be held or deemed to amount to an agreement for partnership between the parties hereto it being the sole and true intent of the said parties to create between them the relation of master and servant only and not that of partner and this agreement and every clause matter and thing herein contained shall be read and construed accordingly."

Before April 6, 1919, the appellant had rented a house in Blackpool; he continued to rent it and to be rated as its occupier during the whole year of assessment; and his wife and family resided therein during his absence in Africa. The appellant was not in the United Kingdom between April 6, 1919, and some date towards the end of March, 1920. He was, however, in the United Kingdom between the latter date and April 5, 1920.

The whole of the salary and commission was paid by the company into a banking account in England, on which the appellant's wife had the power of drawing.

On the figures submitted to them the Commissioners found that the average for the three years of the aggregate salary and commission paid to the appellant was 2245*l.*

The appellant contended that the assessment was bad; that if any assessment could be made it should have been

made on Mrs. Pickles in accordance with the second proviso to r. 16 of the General Rules applicable to Schs. A, B, C, D, and E, but that remittances from salary were not within the proviso, which applied only to allowances or remittances from property; and that he was not a person residing in the United Kingdom.

The respondent contended that the appellant was rightly assessed, and that the case was covered by the decision in *Thomson* v. *Inland Revenue*, or *Bensted*. (1)

The Commissioners were of opinion that the assessment was correctly made as to form, and that the case was covered by *Thomson* v. *Inland Revenue*, or *Bensted*. (1)

Rowlatt J. held that the appellant had not, under his contract, anything in the nature of a "possession" within the meaning of that expression in Case V.; and, further, that in the circumstances the Court had no jurisdiction to amend the assessment or to send it back to the Special Commissioners.

The respondent appealed.

Nov. 20, 21. *R. P. Hills* (*Sir T. Inskip S.-G.* with him) for the Crown. Three questions arose on this case: (1.) Whether the respondent Pickles was resident in this country. Rowlatt J. upheld the decision of the Special Commissioners that he was, and there is no appeal on that point. (2.) Whether the respondent has been properly assessed under Case V. of Sch. D. (3.) Whether, assuming that he was not, there is jurisdiction to send the matter back to the Commissioners in order that the respondent may be properly assessed under some other case of Sch. D. It is submitted that the assessment was properly made by the Commissioners under Case V. If the assessment came within Cases I. and II. the whole of the profits of the employment would be charged, whether received in the United Kingdom or not. The representative of the Crown properly took the view that, as pointed out in *Colquhoun* v. *Brooks* (2), the word

(1) (1918) 56 S. L. R. 10; 7 Tax Cas. 137.
(2) (1889) 14 App. Cas. 493, 508.

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"possessions" in Case V. includes every interest which a person in this country possesses in a business carried on elsewhere. Both Lord Herschell and Lord Macnaghten said that the word "possessions" must be taken in the widest possible sense. The respondent clearly has a taxable source of income under Sch. D derivable from his interest in his agreement with the company.

As to amending assessment or sending it back to the Commissioners to be dealt with under the right case, that can be done under s. 149 (2.) (*a*) of the Income Tax Act, 1918. The whole assessment is not wiped out.

The submission is that this is a case which should be remitted to the Commissioners for reassessment.

[The following cases were also cited: *In re Young* (1); *Cooper* v. *Cadwalader* (2); *Lloyd* v. *Sulley* (3); *Rogers* v. *Inland Revenue* (4); *Turnbull* v. *Foster* (5); *Thomson* v. *Bensted* (6); *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter*. (7)]

Latter K.C. and *Blanco White* for the respondent were not called upon.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J. upon a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. Rowlatt J. heard the case and gave a decision which was adverse to the Inland Revenue, and from that decision the Inland Revenue now appeal.

We have to determine whether his decision on this particular point was right or wrong, and we have come to the conclusion that Rowlatt J. was right.

The facts are sufficiently set out in the case. The question that comes before us for decision arises in this way. Mr. Pickles, the appellant before the Commissioners and before Rowlatt J., had a contract of service with the African

(1) (1875) 1 Tax Cas. 57.
(2) (1904) 5 Tax Cas. 101.
(3) (1884) 2 Tax Cas. 37.
(4) (1879) 1 Tax Cas. 225.
(5) (1904) 6 Tax Cas. 206.
(6) (1918) 7 Tax Cas. 137.
(7) [1896] A. C. 31.

Association, Ld., of Liverpool, under which he was to be employed by the Association in the colony of Nigeria for the period stated in the agreement, and in return for that he was to receive a salary. His employment is not limited, as I understand it, to employment in which he would be engaged while he is out of the United Kingdom, but he is employed for the purposes stated in the agreement, and under that agreement the Association are to pay Mr. Pickles a salary at the rate of 500*l.* per annum during the time he is in Africa and voyaging, and also to pay for his board and other recognized expenses. Then further the company will also pay salary during the time he is at home at the rate of 750*l.* per annum. So that, although his chief duties are to be given to the company in their service while he is in the colony of Nigeria, he is not unemployed when he comes over here, because no doubt he would have to clear up business with his employers, and during such time as he is kept over here for purposes legitimate and in accordance with the agreement, he is to receive a different salary, a higher salary, because he is not given his board and recognized expenses which he receives while he is absent from the United Kingdom. He is also to receive commission on business done. Mr. Pickles, therefore, was employed by the company and enjoyed certain contractual rights. Whatever duties the Association called upon him to fulfil were defined by his contract with them; whatever rights Mr. Pickles had as against the Association were also defined by the contract.

The assessment that was made upon Mr. Pickles was made under Case V. of Sch. D, that is to say, he received a notice of assessment asking him to pay tax in respect of income arising from possessions out of the United Kingdom. Before Rowlatt J. two points were argued. The first was whether or not Mr. Pickles was resident in the United Kingdom so as to be liable to income tax, and it was held by Rowlatt J. that he was resident in Blackpool, and so was properly assessable to income tax. That point was decided in favour of the Crown, and there is no appeal from that decision. As to the second question raised on the appeal, the Commissioners in

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the case stated defined the point of law for the decision of the Court as being "whether the appellant has been correctly assessed in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa."

Any one having experience of the working of the Income Tax Acts, when it is found that the point of law relates only to sums received in or remitted to the United Kingdom, will have his attention drawn to Case V. of Sch. D. The second rule applicable to Case V. is as follows: "The tax in respect of income arising from possessions out of the United Kingdom, other than stock, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported," and so on; that is to say, on the basis of the money which is received in the United Kingdom arising from the source (I may use that broad expression) abroad.

Rowlatt J. held that Case V. was not applicable to the circumstances which it was contended on behalf of the Inland Revenue made Mr. Pickles liable for the tax which they sought to collect from him. He held that the assessment so made was plainly bad, and he determined that the interest that Mr. Pickles held under the contract of May 6, 1919, did not bring him within Case V. of Sch. D. That case makes the subject liable to pay a tax in respect of income arising from possessions out of the United Kingdom. Rowlatt J. held that it was not possible to say that what Mr. Pickles had was a "possession"; he had a contract, but it was not within the meaning of the words "possessions out of the United Kingdom." I agree with Rowlatt J. It has been strenuously argued by counsel for the Inland Revenue that the word "possessions" really covers any kind of property, including whatever it may be that Mr. Pickles holds under his agreement, and, in support of that argument, he relied upon *Colquhoun* v. *Brooks* (1), and he says that both

(1) 14 App. Cas. 493.

Lord Herschell and Lord Macnaghten in their speeches treat the word "possessions" as being the widest and most embracing term, and that to cut it down so as to exclude employment which is a source of income is to go contrary to the reasoning, if not the decision, of that particular case. Having read the speeches of the two noble Lords very carefully, I am satisfied that, although, as Lord Macnaghten says, the word "possession" is to be taken in the widest sense possible as denoting everything that a person has as a source of income, he has in his mind some form of what could be broadly called "property" as a source of income, property not only in the sense of physical possessions, but something which would include business, trade, and so on, in which capital is employed, but I do not think he intended to include in that a mere contract. There are fundamental differences between contractual rights and rights which arise out of property. Illustrations of that are constantly arising, and a distinction is drawn to which I will only refer as indicating what I have in my mind: for instance, the difference between the circumstances which appertain to a man who owns a ship and a man who is merely the charterer of the ship. Well defined results arise from the difference between ownership and the contractual rights of a charterer. It seems to me that it would be twisting the words of Lord Herschell and Lord Macnaghten into a sense which they never intended if you were to say that a man who has a contract under which he is to render services has a "possession" because under the contract in proper circumstances he is to be paid a salary and commission.

Rowlatt J. took the same view of *Colquhoun* v. *Brooks*. (1) He pointed out that Mr. Pickles is de facto employed under a contract, but he took the same view that I do, that although the contract may be a source of income, it is not a "possession."

Sch. D as it now stands in the Act of 1918 is divided first of all into two limbs. It deals with the profits or gains arising from any kind of property whatever, wherever situate, in

(1) 14 App. Cas. 493.

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the United Kingdom or elsewhere, and profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation. It is to be remarked that these two limbs are specifically divided: you have on the one side property and on the other side you have trade, profession, employment or vocation, and when you come to the cases or rules which are more specific, and under which you are to deal with the taxation of persons who fall under either the one limb or the other, you find the same distinction connoted. You find Case I. and Case II. deal with trade, profession, employment or vocation, while Cases IV. and V. deal with what is more commonly called property—namely, income arising from securities out of the United Kingdom and income arising from possessions out of the United Kingdom, and I think you may say that under Sch. D there is, if not a very clear line drawn, certainly a demarcation intended to be indicated between cases which fall within the words "property of any kind whatever" and cases which fall within the words "any trade, profession, employment or vocation."

For the reasons which I have given, I do not think that *Colquhoun* v. *Brooks* (1) applies to this case. I do not think that Case V. is the right case or rule to apply to the circumstances which attach to Mr. Pickles' position under the contract—that in effect there is an antithesis between matters which fall under Case II. of Sch. D and matters which fall under Case V. If that be so, it seems to me that, having regard to the nature of the contract, Mr. Pickles has had invoked against him the wrong case for the purpose of making him liable to pay tax in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa. That is the real point on which the appeal is brought before us, and that is the sole point which Rowlatt J. decided against the Inland Revenue. I say "sole point" for this reason. It has been pointed out to us by counsel for the Inland Revenue that there is a power under s. 149 of the Act of 1918 to send

(1) 14 App. Cas. 493.

the case back to the Commissioners with an indication that the assessment may be right although it may have been imposed or started under the wrong case, but, as I have pointed out, the assessment which is made is one which seems to indicate that Case V. was the case which was invoked, and to deal only with profits which would be within that case, that is to say, profits received in this country. I think it would be very unfortunate if this decision were taken to be of anything like a wide-reaching nature. We are dealing specifically with the point decided by Rowlatt J., the point which he held to be argued before him, and the point which alone arises for our decision. What the liability of Mr. Pickles may be when there is a fresh assessment, if a fresh assessment can be made, I do not know. Certainly, for my part, I am not going to suggest or to indicate that there is either an enlarging or a narrowing of the liability to which Mr. Pickles is subject. When the matter has been reconsidered and dealt with, it may be that he will be liable to assessment for quite a different quantum of profits or gains received. I do not know. I express no opinion. All that I do say is that I think Case V. does not embrace this case, the reasoning of Rowlatt J. was quite sound, that I agree with it, and therefore this appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. Besides the particular question of law which we have to decide, there arose incidentally the question whether the respondent Mr. Pickles was liable to be taxed to income tax at all, inasmuch as it was contended he was not resident in the United Kingdom. That question was decided by Rowlatt J. in favour of the Inland Revenue. In the view we take of the point of law it is unnecessary to deal with the question as to the residence of the respondent, and accordingly I assume that he was resident in the United Kingdom.

I now proceed to consider whether the decision of Rowlatt J., which in effect discharged the assessment which had been made upon the respondent, was correct. I take the statement in the special case as describing what the assessment

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was and on what the respondent was charged. The statement is as follows: "The assessment was made under Sch. D of the Income Tax Act, 1918, in respect of the appellant's possessions out of the United Kingdom, viz. his earnings from his employment in West Africa under the agreement hereinafter referred to." I will read that part of Sch. D which is material. Sch. D provides in the second paragraph of sub-s. (*a*) of s. 1, that "the tax shall be charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere"; and then, as we know, that general statement of what the tax is to be charged upon is governed by certain rules, and, amongst others, by what is called Case V. and the rules made in respect of it. Case V. specifies "Tax in respect of income arising from possessions out of the United Kingdom."

The Commissioners have deliberately chosen to assess the respondent here in respect of income arising from possessions out of the United Kingdom, and they have done so in reliance upon the decision in *Colquhoun* v. *Brooks* (1), which, while expressing the opinion of the House of Lords that a person carrying on business abroad was on the true construction of the Act not liable to be assessed to income tax on the whole of his profits, arrived at the conclusion that he was liable to be assessed on so much of his profits as were remitted to this country, but on the ground that those profits arose from a possession out of the United Kingdom. The Commissioners, therefore, have deliberately adopted the view that Mr. Pickles is not liable to be assessed on the whole of the remuneration or profits or gains, to use the statutory words, derived from his employment, but he is only liable on so much thereof as is remitted to this country, and they have, therefore, chosen deliberately to assess him as on income arising from a possession out of the United Kingdom. The question submitted to the Court by the Commissioners is thus stated:

(1) 14 App. Cas. 493.

"The point of law for the decision of the Court is whether the appellant has been correctly assessed in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa." That only states in other words that the question which we have to determine is whether the Commissioners were right or wrong in point of law in treating him as assessable in respect of income arising from a possession out of the United Kingdom, because it is only if he is so assessable that the tax would be limited to that part of his earnings which is remitted from abroad. Is that view of the Commissioners the right one—namely, that he is deriving income from a possession abroad? [The Lord Justice quoted from the case stated by the Special Commissioners the terms of the agreement as given above.]

It appears, therefore, that the present respondent's right to salary, commission and so forth and his obligations to his employers all arose under an English contract made with an English company, and the only foreign element in the matter is found in the fact that the main part of his duties is to be performed abroad.

In my opinion, the rights and duties of the respondent under this contract cannot by the widest stretch of language be described as a "possession out of the United Kingdom." Rowlatt J. has gone further, and has expressed the opinion that his rights under this contract are not a "possession" at all, even in the wide sense attributed to that word by the learned Lords who dealt with *Colquhoun* v. *Brooks*. (1) I must not be supposed to express dissent from the view taken by Rowlatt J., but having regard to what I have said and the necessity of the Crown's establishing that this is a possession abroad, it is unnecessary to say whether or not it is a possession in a more abstract sense. I think therefore that the decision of Rowlatt J. was right and that the appeal ought to be dismissed.

But then it is said that we ought not to simply dismiss

(1) 14 App. Cas. 493.

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the appeal but ought to remit the case to the Commissioners in order that they may amend the assessment, and charge the respondent Mr. Pickles in some other way and under some other of the cases under Sch. D. No doubt we have power to take that course, but, in my opinion, this is not a case in which we ought to do that. Here the Commissioners have deliberately assumed and acted on the assumption that this respondent can be assessed only under Case V. and the rules under Case V., which would confine the assessment as being made on the amount of the earnings remitted to this country. That being, as we hold it to be, an incorrect view, a very serious question arises whether, having regard to the judgments in *Colquhoun* v. *Brooks* (1), this gentleman can be assessed at all. It is not merely a question whether in some minor point of detail the Commissioners have made a mistake: it may be that the result of the judgments in *Colquhoun* v. *Brooks* (1) is that unless in such a case the taxpayer or the alleged taxpayer can be charged on the income remitted to this country from a possession abroad, he cannot be charged at all. In fact the question raises the very case which Lord Herschell hinted at in a passage in his speech in *Colquhoun* v. *Brooks*. (2) The passage is this: "If the result of rejecting the argument presented on behalf of the Crown were to land your Lordships in the conclusion that profits arising from a business carried on abroad, even though received here, were not subject to the tax it would present a formidable obstacle to yielding to the argument of the respondent, though I am not sure that the difficulties you would have to encounter in refusing your assent to it"—that is the argument of the respondent, the taxpayer—"would not even then be greater." It seems to me, therefore, that there is here a very serious question, not merely a minor question of detail.

Under these circumstances it seems to me that the proper course for this Court to take is simply to dismiss the appeal, the effect of which will be to discharge the existing assessment,

(1) 14 App. Cas. 493. (2) 14 App. Cas. 508.

and if the Crown are advised to proceed to attempt to charge Mr. Pickles under some other part of the Act, they had better begin afresh.

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ASTBURY J. I entirely agree.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Withall & Withall.*

G. A. S.

[IN THE COURT OF APPEAL.]

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ROBERTS *v.* ENLAYDE, LIMITED.

Landlord and Tenant — Lease—Covenant not to sublet Premises without Consent—Proviso—Covenant not to apply to Sub-letting of Premises or any Part thereof for less than Three Years — Part sublet without Consent for less than Three Years—Residue sublet without Consent for more than Three Years—Breach of Covenant—Forfeiture.

A lessee covenanted with his lessor that he would not "underlet or otherwise part with the possession of the premises" without the lessor's consent, the covenant containing a proviso that it should "not apply to any underletting of the said premises or any part thereof for a term not exceeding three years." The lessee, without the lessor's consent, underlet a portion of the premises to T. on a weekly tenancy, and subsequently underlet the residue of the premises to W. for a term of twenty-one years without the lessor's consent:—

Held, that the two underlettings did not amount to a breach of the covenant, for the underletting to W. was not a breach, not being an underletting of the whole of the premises, nor was the underletting to T. a breach, being for a term of less than three years and therefore excepted from the covenant by the proviso; and the fact that the two underlettings together constituted an underletting of the whole premises made no difference in this respect.

Chatterton v. *Terrell* [1923] A. C. 578 distinguished.

Judgment of Greer J. reversed.

APPEAL from a judgment of Greer J. at the trial.

In 1913 the plaintiff, Miss Roberts, demised a parcel of land at Shoreditch with the factory, sheds and buildings thereon to J. R. Burton for a term of 48½ years from September 29, 1913. By the said lease Burton covenanted

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"that he the lessee his executors administrators and assigns shall not assign demise underlet or otherwise part with the possession of the said premises (otherwise than by will) for all or any part of the said term thereby granted without the consent in writing of the lessor his executors administrators or assigns first had and obtained. . . . . Provided that this clause shall not apply to any underletting of the said premises or any part thereof for a term not exceeding three years." The indenture contained a proviso for re-entry for breach of any of the covenants. On March 23, 1915, Burton assigned the lease to the defendants with the lessor's consent. On August 13, 1921, the defendants, without the plaintiff's consent, sublet a portion of the premises, consisting of a cottage, shed and yard, to A. Turnpenny on a weekly tenancy, and subsequently, without the lessor's consent, underlet the whole of the remainder of the premises to A. T. Woolnough, Ld., for a term of twenty-one years from December 25, 1920. Turnpenny and Woolnough, Ld., entered into possession of their respective tenancies. The action was brought to recover possession of the premises for breach of the covenant not to underlet them without the plaintiff's consent. Greer J. held that there had been a breach of the covenant, and gave judgment for the plaintiff. He was of opinion that, even if neither of the two underlettings taken separately was a breach of the covenant, to hold that the combination of the two was not a breach would be in conflict with the decision of the House of Lords in *Chatterton* v. *Terrell*. (1) He read the proviso as meaning "that the clause is not to apply if, taking all the underlettings together, there is not an underletting for a term exceeding three years; that is to say, if no portion of the premises, the whole being let, is let for a period exceeding three years the clause is not to apply, but if there is a parting with the possession of the whole of the premises, and a portion of the premises is parted with for more than three years, then the proviso does not come into operation, and the covenant takes effect."

The defendants appealed to the Court of Appeal.

(1) [1922] 2 Ch. 647; [1923] A. C. 578.

Grant K.C. and *Arnold Jolly* for the appellants. The proviso operates as an exception from the covenant, and the effect of the covenant and proviso taken together is that the defendants covenanted not to underlet the whole premises for a period of more than three years. If so, it is plain that there has been no breach ; the underletting to Woolnough, Ld., was not a breach, for it was an underletting of a part only, whereas the covenant is against underletting the whole, and the underletting to Turnpenny was not a breach, for it was expressly excepted from the covenant. The case of *Chatterton* v. *Terrell* (1) is distinguishable. There the covenant was not to underlet the premises without the consent of the lessor. The tenant, with the lessor's consent, underlet a part of the premises, and subsequently underlet the rest of the premises without his consent. The only question there was whether the consent to the underletting of a part had the same effect as a consent to the underletting of the whole, and it was held that it had not. But even if the covenant in the present case is ambiguous it ought to be construed against the lessor. If the lessor uses ambiguous words in a covenant which if broken would entail a forfeiture he cannot complain if it is construed strictly against him : *Russell* v. *Beecham.* (2)

Haydon K.C. and *C. Reuben* for the respondent. The object in exacting a covenant from the tenant not to underlet without consent, is that the lessor having let to a person whom he trusts desires to secure himself against the premises passing into the possession of a person of whom he knows nothing. He may be willing to relax the stringency of that covenant by agreeing to allow an underletting for a short term, such as a term of less than three years, but it is important that that relaxation should not be used to defeat the covenant. In *Terrell* v. *Chatterton* (3), when that case was before the Court of Appeal, Younger L.J., who agreed that what was done there constituted a breach of the covenant, said : " If we were to hold otherwise, it seems to me that in a similar case the tenant could sublet a small and immaterial part

(1) [1923] A. C. 578. (2) [1923] 40 Times L. R. 66.
(3) [1922] 2 Ch. 647, 652.

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of the premises to a desirable sub-tenant, and then he might, without the lessor's consent, sub-let the larger and really material part to a highly undesirable tenant, without incurring any risk of a forfeiture." That is directly applicable to the facts of the present case. The effect of the decision in *Chatterton* v. *Terrell* (1) was that although a letting of part of the premises without consent would not have been a breach taken by itself, if the residue was let even with consent it assumed a different character, and amounted to a breach. So here, though the letting to Woolnough, Ld., was not by itself a breach of the covenant, as the result of the two underlettings was that the whole of the premises were let, it assumed a different character and amounted to a breach.

BANKES L.J. The only question in this appeal is what construction should be put upon the covenant against underletting or parting with the possession of the premises without the lessor's consent, when read along with the proviso. That proviso, which so far as my experience goes is in an unusual form, I regard as an exception to the covenant which precedes it. Bearing that in mind, I think it is necessary to consider what the position of the lessee would be apart from any such covenant. His position would be this: he would have the right, as incident to his leasehold estate, to part with the possession of the whole or any part of the premises for the whole or any part of the term. It is with reference to that position that the covenant is introduced, and, if we read the proviso as an exception to the covenant, the effect of the two together is that they leave the lessee free to exercise his right of underletting the premises or any part thereof for a term not exceeding three years, but otherwise bind him down not to underlet or part with possession without the consent of the lessor. But if that be so it seems to me quite plain that there has been no breach of the covenant here. What happened was that the tenant underlet a small part of the premises to one sub-tenant for less than three

(1) [1923] A. C. 578.

years, and then underlet the remainder of the premises to another sub-tenant for more than three years. Neither of those underlettings was a breach, for the former was excepted from the covenant by the proviso, while the latter was not an underletting of the whole of the premises. For these reasons I think the appeal should be allowed.

SCRUTTON L.J. This covenant, for an alleged breach of which forfeiture is claimed, I read to be a covenant not to assign underlet or part with the possession of the whole of the premises for a term exceeding three years. What the lessees have in fact done is that they have underlet part of their premises for a term exceeding three years. They have underlet the rest of their premises for a term less than three years. They have not underlet the whole of their premises for a term exceeding three years. They have not parted with possession of any part of the premises otherwise than by underletting. And it is conceded that the covenant is not a covenant against underletting a part of the premises. Under those circumstances it seems to me that there has been no forfeiture. We have been referred to *Chatterton* v. *Terrell* (1), a decision of the House of Lords, by which, of course, we are bound. But that case seems to me to turn on a different point. There the covenant was against underletting or parting with the possession of the premises, by which was meant the whole premises, without the consent of the lessor. The lessee parted with the possession of the whole premises by two underlettings, one of which was with the lessor's consent and the other without it. The Lords read the words "without the consent of the lessor" to mean "without his consent to the underletting of the whole premises." And upon that reading of the covenant there was clearly a direct breach of it, for the tenant had underlet the whole premises without getting the lessor's consent to the underletting of the whole. Here the covenant is not to underlet the whole premises for a term exceeding three

(1) [1923] A. C. 578.

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years, but the tenant has not underlet the whole of the premises for a term exceeding three years. I agree that the appeal must be allowed.

ATKIN L.J. I agree. The breach alleged here is that there was an underletting of the whole premises by reason of two lettings, each of a part. The first letting was of a part of the premises for less than three years. The second letting was of the remainder of the premises for more than three years. In order to show that that constitutes a breach of the covenant it is necessary to show that the covenant applies to both lettings, but the proviso in express terms says that it is not to apply to the first letting. Under those circumstances the only letting that offended against the covenant was the second, the letting of part of the premises for more than three years, and it is conceded that if that is the only matter on which the plaintiff can rely it is insufficient to work a forfeiture, because the covenant only applies to a letting of the whole premises. That being so the only way in which the learned judge could give judgment for the plaintiff was by holding that the proviso was only applicable to a letting of the whole premises, either by one letting of the whole or by lettings of parts together making up the whole. But the proviso says in the plainest terms that the covenant is "not to apply to any underletting of the said premises or any part thereof for a term not exceeding three years." The learned judge's decision entirely disregards the words "or any part thereof." The real difficulty in this case has arisen from the fact that the lessor has taken the covenant in a form which affords her very little protection. A covenant, to be of any real value, ought to provide that the lessee shall not underlet the premises or any part thereof. Otherwise the difficulty arises which is referred to by Younger L.J. in *Terrell* v. *Chatterton* (1); the lessee may underlet a substantial part of the premises to a most undesirable tenant and yet not commit a breach of the covenant. As far as that case is concerned I think it was a

(1) [1922] 2 Ch. 647, 652.

wholly different case, for there the covenant undoubtedly did relate to the whole premises, and the letting complained of was a letting to which the covenant applied, there being no proviso such as there is in this case expressly excluding the application of the covenant to the underletting of part of the premises for a short term. For these reasons I agree that the appeal should be allowed.

BANKES L.J. I ought to have referred to *Chatterton* v. *Terrell.* (1) I agree that it has no application to the facts of this case.

Appeal allowed.

Solicitors for the appellants: *Milner & Bickford.*
Solicitors for the respondent: *Marston & Robinson.*

J. F. C.

[IN THE COURT OF APPEAL.]

JOB EDWARDS, LIMITED *v.* THE COMPANY OF PROPRIETORS OF THE BIRMINGHAM NAVIGATIONS.

[1922. J. 34.]

[WALSALL DISTRICT REGISTRY].

Nuisance—Fire—Derelict Land—Liability of Owner—Absence of Knowledge—Continuing a Nuisance—Fire accidentally beginning—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86.

A canal company owned a canal bank and some land beyond it. Adjoining this land was a piece of land belonging to certain mine-owners which, having been acquired by their predecessors in title for mining but found useless for that purpose, had been left unused and unoccupied by its owners. For some years a third person in return for payment purported to allow others to discharge refuse at first on the canal company's land and afterwards, without the knowledge or assent of the mine-owners, upon their land also. The refuse was carried over the canal company's embankment and land and the company charged a wayleave rent for allowing this. Early in 1920 the refuse on the mine-owners' land was found to be on fire; in May,

(1) [1923] A. C. 578.

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1920, the fire was approaching the canal company's land, and the company, fearing that it might reach to and injure the canal, called upon the mine-owners to extinguish it. Thereupon by agreement between the canal company and the mine-owners the canal company entered upon the mine-owners' land and extinguished the fire, and the mine-owners paid to the canal company half the expense of so doing, without prejudice to the legal position of the parties.

In an action by the mine-owners for a declaration that they were not liable to pay any part of the cost of the works undertaken and for an order for repayment of the sum paid by them in respect thereof:—

Held, by Bankes L.J. and Astbury J., that the plaintiffs were entitled to succeed on the ground that there was no public nuisance, and no evidence that they either caused or continued the fire or were guilty of any negligence in relation to it;

Scrutton L.J. dissenting on the ground that a landowner who fails to abate a nuisance within a reasonable time after it has come or ought to have come to his knowledge, or who fails to take reasonable means to remove from his land an artificial danger which he knows will damage other persons if allowed to remain, may be responsible for resulting damage; and that there ought to be a new trial to ascertain when the plaintiffs first knew that the fire was burning on their land, and how far the defendants were liable for contributory negligence in allowing the refuse to be carried over their land.

Saxby v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1869) L. R. 4 C. P. 198 approved.

Attorney-General v. *Tod Heatley* [1897] 1 Ch. 560 distinguished.

Judgment of Bailhache J. affirmed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The plaintiffs were the owners of a piece of derelict land close to the bank of the Tame Valley Canal which belonged to the defendants, a canal company. This piece of land had been bought by the predecessors in title of the plaintiffs for mining purposes, but the minerals could not be profitably gotten by reason of the quantity of water in the subsoil, and the land had been left unoccupied and unused by its owners. Up to May, 1920, and even later it was doubtful where the boundary lay between this piece of land and the defendants' property.

For some years before 1920 refuse and rubbish of all sorts had been tipped on or near this piece of land. When its boundaries were ascertained it appeared that at first the tipping had been on land supposed to belong to the plaintiffs but in fact belonging to the defendants, and lying

between their canal bank and the plaintiffs' piece of land, and later on the plaintiffs' land. This was done without the knowledge or permission of the plaintiffs, by the de facto permission of one Instone, who pretended to be in lawful occupation of the land and made a charge for leave to tip refuse upon it. The defendants knew that refuse was being tipped upon the land. It came down the canal in barges and was carted over the canal bank and the canal company's land, and the company charged a wayleave rent to persons so carting it.

In February, 1920, the defendants became aware that the refuse tipped on the plaintiffs' land had taken fire. By May, 1920, it became apparent that the fire was likely to spread to the heap which had been tipped on the defendants' property and to damage the canal bank and the puddling at the bottom of the canal. As it was doubtful whether the plaintiffs or the defendants would be responsible for any damage so caused, it was agreed between them in October, 1920, that the defendants should do the work necessary to stop the fire from spreading, and that the plaintiffs should contribute half the cost without prejudice to their legal position. The defendants then dug a trench between the burning refuse and the canal bank and filled the trench with sand and so stopped the fire from spreading, and the plaintiffs paid 500*l.* to the defendants in accordance with their agreement.

As the defendants took no steps to ascertain the legal rights of the parties, the plaintiffs brought this action claiming a declaration that they were not liable to pay any part of the cost of the works undertaken by the defendants and an order for repayment by the defendants of the money paid under the agreement.

Bailhache J. in the course of his judgment said: In this case Job Edwards, Ld., are the plaintiffs and the Birmingham Canal Navigations are the defendants. In most cases of this kind the positions are reversed, but this case presents an unusual appearance in consequence of an arrangement made between the parties. The question is, Who is liable to pay for the expense incurred in abating a nuisance, to

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wit a fire smouldering on the plaintiffs' land and first discovered in May, 1920 ? The case proceeds on the assumption that the plaintiffs were entirely ignorant that this refuse had been brought upon their land, and on the further assumption that they are entirely innocent of causing the fire, which will do damage if it spreads to the land of the defendants. On whom is the duty of preventing it spreading to the defendants' land ? In my judgment the duty is upon the defendants, who do not wish the fire to come upon their land. They have a right to go upon the plaintiffs' land to abate a nuisance, but if they do so it must be at their own expense. I ought to say at once that here there is no question of a public nuisance. The canal bank is not a highway, and I am not concerned with the duty of an owner who upon his land has a nuisance which is a nuisance to the public but which is not created by him. If the nuisance is a nuisance to the public, for example on a highway, different considerations arise. [The learned judge then referred to the Fires Prevention (Metropolis) Act, 1774, and *Musgrove* v. *Pandelis* (1), and proceeded :] In my judgment, on principle and apart from authority, where it is not a case of a public nuisance but of a private nuisance, where a fire occurs through no fault of the landowner, without his knowledge, and, as in this case, on matter brought on his land without his knowledge and against his will, he is not responsible for the spreading of such a fire to the adjoining land, but the neighbour is entitled to go upon his land and prevent the fire from spreading. That is what the defendants have done here. They must bear the expense of the work which was done for their benefit.

Judgment was therefore given for the plaintiffs.

The defendants appealed.

Vachell K.C. and *Joy* for the appellants. No doubt a person on whose estate any fire shall accidentally begin is exempted from liability by s. 86 of the Fires Prevention (Metropolis) Act, 1774, for damage caused by that fire ;

(1) [1919] 2 K. B. 43.

and it may be admitted that a fire accidentally began upon land belonging to the respondents. But the fire which caused or threatened to cause damage to the appellants' property was not the fire which accidentally began on the respondents' land, when it might have been extinguished quickly and easily, but the fire which was from May to October, 1920, allowed to increase and become formidable: *Musgrove* v. *Pandelis*. (1)

One who is not protected by the Fires Prevention (Metropolis) Act, 1774, is liable if, having a fire upon his land, however created, he does not keep it on his land and prevent it from injuring his neighbours. This is an instance of the principle of *Rylands* v. *Fletcher* (2); *Black* v. *Christchurch Finance Co.* (3) At any rate, after becoming aware of its existence he becomes responsible for damage done by it. "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement." (4) "A landowner is not liable for a nuisance caused, not by his own action, but by something done by another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge": *Barker* v. *Herbert* (5), per Farwell L.J. But if he suffers the nuisance to continue he becomes liable for it: *Attorney-General* v. *Tod Heatley*. (6)

Bailhache J. drew a distinction between a public nuisance and a private nuisance on the ground that in the latter case the person aggrieved may take the matter into his own hands and abate the nuisance. But that does not lead to the conclusion that the other party is less liable for a

(1) [1919] 2 K. B. 43.
(2) (1868) L. R. 3 H. L. 330.
(3) [1894] A. C. 48.
(4) Salmond, Law of Torts, 5th ed. (1920), p. 260.
(5) [1911] 2 K. B. 633, 645.
(6) [1897] 1 Ch. 560.

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private than for a public nuisance. Every person who suffers particular damage from a public nuisance has a private right of action. And even if this were not so a nuisance to a canal is as public an offence as a nuisance to a highway. *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) is cited as an authority that the occupier of land is not liable for mere omission to abate a nuisance created thereon without his consent. But that case cannot be taken as laying down any general principle to that effect. The facts are obscure, but it appears that the defendants, although owners of the bed of the artificial watercourse or cutting which had been obstructed, were not the owners of the adjoining land. They were a railway company who having made the cut for the convenience of their line were bound by statute to keep its banks and bed in repair, and they had had no part or share in the obstruction of the watercourse, which when the two print works were in the sole ownership of Welch, the former owner, was an innocent act and only assumed the aspect of a nuisance when he sold the works lower down the river Goit to the plaintiff. The defendants had done nothing, and they were ready and willing, so far as in them lay, to permit the plaintiff to remove the weir. It could hardly be held that Welch by selling one of the factories to the plaintiff could impose a new and greater burden on the defendants.

E. W. Cave K.C. and *R. A. Willes* for the respondents. Mere ownership of land involves no liability for nuisances created thereon by third parties. Authority or permission to create the nuisance, or privity in its creation, or at least knowledge of its existence, is necessary to make an owner, who does not create the nuisance himself, liable for its consequences. It is said that an owner of land is liable for "continuing" a nuisance; but an owner does not continue a nuisance if he is unaware of its existence. *Saxby's Case* (1) is good law in spite of the adverse comment in Salmond's Law of Torts. (2) Vaughan Williams L.J. founded

(1) L. R. 4 C. P. 198.
(2) Salmond, Law of Torts, 5th ed. (1920), p. 260.

his judgment in *Barker* v. *Herbert* (1) upon that case, and the judgments of Fletcher Moulton and Farwell L.JJ. (2) are in accordance with its principle. It is cited with approval in Clerk and Lindsell on Torts (3) as authority for the proposition that "mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it." Until May 7 the respondents knew nothing of the nuisance. On that date they became aware of its existence, but it was not then known on whose property it was. As soon as this was ascertained the respondents took the most reasonable course in co-operating with the appellants to extinguish the fire. In these circumstances it cannot be said that the respondents continued the nuisance. If they had done anything to hinder or obstruct the appellants in abating or attempting to abate the nuisance there might be some ground for saying they had continued the nuisance. They have done nothing of that kind, but have done all that can be required of them when in October, 1920, they invited the appellants to enter upon the land and extinguish the fire themselves.

It is also submitted that the fire accidentally began on the respondents' estate within the meaning of s. 86 of the Fires Prevention (Metropolis) Act, 1774; and that the appellants contributed to the nuisance by granting wayleaves over their land enabling persons, who to their knowledge were tipping refuse on the respondents' land, to cross their land for that purpose.

Vachell K.C. in reply.

Cur. adv. vult.

Nov. 5. The following written judgments were delivered :—

BANKES L.J. In this action an important question of law is raised in a curious way. Waste land belonging to the plaintiffs, and close to the defendants' canal, was used as

(1) [1911] 2 K. B. 633, 639. (2) [1911] 2 K. B. 642, 645.
(3) 7th ed. (1921), p. 419.

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a tip for refuse. This was done without the plaintiffs' knowledge or consent by a person who made a profit out of the use of the tip. The refuse was all brought in barges along the defendants' canal and, when unloaded, was transported to this tip over the defendants' land by their leave and licence, for which a charge was made. As early as the month of February, 1920, the defendants were made aware that the refuse composing the tip was on fire. The defendants do not appear to have stopped the tipping of refuse. By the month of May it became apparent that the fire in the tip was likely to become a danger to the canal, inasmuch as it was likely to approach so close to the bed of the canal as to seriously endanger its water-holding capacity. Under these circumstances the defendants, by letter dated May 7, 1920, called the plaintiffs' attention to the condition of the tip, and the existence of the fire, and the probable danger to the canal, and requested the plaintiffs to take the earliest possible measures to prevent the fire spreading further. Considerable delay occurred before the plaintiffs could decide on the course to adopt, as the person using the tip claimed it as his property, and there was some question as to the exact position of the plaintiffs' and the defendants' boundary. It was not until the month of October that with a view of preventing any damage to the canal the plaintiffs suggested that the defendants should themselves carry out the necessary protective works, and that the plaintiffs would at once contribute 500*l.* towards the cost, the arrangement being entirely without prejudice to the rights of the parties, which should at some subsequent date be determined. This proposal was agreed to. The money was paid, and the work completed. The cost of the work largely exceeded 500*l.* As the defendants took no step to have the question of liability determined, the plaintiffs commenced the present action, claiming a declaration that they were under no liability to pay for any portion of the works necessary to protect the canal, and claiming also a return of the 500*l.* The action was tried before Bailhache J., who found as facts (if, indeed, it was not conceded) that the plaintiffs were entirely ignorant

that any refuse was being brought upon their land, that they were entirely innocent of causing the fire, and that the fire was caused by spontaneous combustion. In my opinion the delay which occurred in dealing with the fire between the date in May, when the plaintiffs' attention was called to it, and the date in October, when the parties agreed upon the action to be taken, is, under the circumstances of the case, immaterial. Having regard to the facts that the parties ultimately agreed that the question of liability was the question to be determined, and that the pleadings raise that point and that point only, the question whether the expense of the necessary work was greater because commenced in October instead of May does not arise. Even if it did, I do not think that there was any evidence of unreasonable delay on the part of the plaintiffs. Mr. Vachell laid stress on this lapse of time before any action was taken in support of his contention founded on the case of *Musgrove* v. *Pandelis*. (1) I will deal with this point in its order.

Upon these facts three questions of law were raised: (1.) What is the duty of a person upon whose land a nuisance exists, which is a danger to the land or property of an adjoining owner, when his attention is called to the danger, and the fact is that he has neither created the nuisance, nor consented to its continuance? (2.) Assuming that a duty to abate the nuisance exists at common law, is the owner excused by statute if the nuisance is a fire which began accidentally? (3.) Does the fact that the defendants appear to have been to some extent responsible for the deposit of the refuse on the tip disentitle them to rely upon their common law right (if any)? I dismiss the last point from consideration, because I do not think that it was made at the trial in such a way as would justify this Court in deciding it on the present materials. If it was necessary to decide it, which for the reasons I now proceed to give I do not think that it is, it would be necessary to direct a new trial.

The first point is obviously one of far-reaching importance. For the defendants, it is contended that the case is covered

(1) [1919] 2 K. B. 43.

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by the principle laid down in *Rylands* v. *Fletcher*. (1) For the plaintiffs, it is contended that there is no authority in support of that contention; that the case on its facts is distinguishable from *Rylands* v. *Fletcher* (1) and cases of that class, and that there is authority which this Court should follow negativing the liability contended for by the defendants.

In discussing the question it is all important to bear in mind the distinction between cases of public and private nuisance. For what were, no doubt, considered good and sufficient reasons, the common law has, in the public interest, cast a very onerous duty upon the possessor of land or premises upon which a public nuisance exists. The case of *Attorney-General* v. *Tod Heatley* (2) is an instance in which the Court enforced that duty. It is clear that in the case of a public nuisance, when once the existence of the nuisance upon his land becomes known to the occupier of the land, it is his duty to abate it, or to endeavour to abate it, even though he is entirely innocent of either causing the nuisance or of allowing it to continue: *Barker* v. *Herbert* (3); *Harrold* v. *Watney*. (4) I can find no authority which suggests that the same standard of duty is required of the occupier of land in the case of injury resulting from a private nuisance on his land. Every consideration, apart from authority, appears to me to point in a contrary direction. In the first place the common law has given the person threatened with injury the exceptional right to enter upon the land on which the nuisance exists and to do what is necessary to abate it. This in itself, I think, points to the conclusion that this remedy was given because it was recognized that though in some cases another remedy might exist yet there were cases in which the law did not afford any other remedy. Again, as between two entirely innocent parties, why should the one in whose interest an expenditure is required in order to abate a danger to himself not be the person to bear the necessary expenditure? I am of course confining these

(1) L. R. 3 H. L. 330.
(2) [1897] 1 Ch. 560.
(3) [1911] 2 K. B. 633.
(4) [1898] 2 Q. B. 320.

observations to the case where the possessor of the land on which the nuisance exists is entirely innocent of either creating, or continuing it. In my opinion the case of *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) is a direct authority in support of the view of the law which I am putting forward. I can see no ground for the adverse criticism directed at the decision in that case by some of our leading text-writers. It appears to me to be founded on sound principle and good sense. Vaughan Williams L.J. in *Barker* v. *Herbert* (2) cites the case with apparent approval, and the decision appears to me to be quite consistent with such cases as *Black* v. *Christchurch Finance Co.* (3), which proceeds upon the assumption that the defendants in that case would not have been liable had the fire been lighted by a trespasser, and with the dictum of Bramwell B. in *Nichols* v. *Marsland* (4) in reference to the liability for the act of a mischievous boy in boring a hole in a cistern, and with many other cases of the same class which might be cited. In the case of *Rickards* v. *Lothian* (5) Lord Moulton in delivering the judgment of the Privy Council, after an examination of the authorities, says: "Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable on the principle of *Fletcher* v. *Rylands* (6) for damage caused by the wrongful acts of third persons." The case of the overhanging tree is distinguishable from the class of cases with which I have been dealing. In some cases, as in *Crowhurst* v. *Amersham Burial Board* (7), the body sought to be made liable had planted the tree. In other cases, such as *Smith* v. *Giddy* (8), the occupier, if not responsible for the planting of the tree, may yet be liable upon the principle that an occupier who takes possession of land upon which a nuisance exists is liable for the continuance of it after he has taken possession: *Broder* v. *Saillard.* (9) In other words he voluntarily steps

(1) L. R. 4 C. P. 198.
(2) [1911] 2 K. B. 633.
(3) [1894] A. C. 48.
(4) (1875) L. R. 10 Ex. 255, 259.
(5) [1913] A. C. 263, 279.
(6) (1866) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(7) (1878) 4 Ex. D. 5.
(8) [1904] 2 K. B. 448.
(9) (1876) 2 Ch. D. 692.

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into the shoes of the person who was responsible for creating the nuisance. The case of fire has always been looked upon in our law as a somewhat exceptional case. It was no doubt the ancient law or custom of England that a person in whose house a fire originated which afterwards spread to his neighbour's property and destroyed it must make good the loss, but I do not consider that rule as opposed to the view I am putting forward in regard to liability for injury done by a private nuisance, as the ancient law no doubt considered a fire as a public nuisance owing to the danger of its spreading. The view of the law which I am taking does not touch a case where the private nuisance has been caused, or allowed to continue, by any act or default on the part of the occupier of the land on which it exists. As I have endeavoured to point out, the mere refusal or neglect to remove the nuisance, if it be a private nuisance, does not in my opinion of itself constitute a default. What within the language of the Lords Justices in *Barker* v. *Herbert* (1) will constitute a continuance of a private nuisance so as to create an actionable wrong, must depend upon the evidence in each case. A deliberate refusal to give an adjoining owner notice of the danger, or an obstruction of that owner in his endeavour to abate the nuisance, may be evidence of a continuance. There may be cases (though I am not deciding the point) in which the act necessary to abate the nuisance in the first instance was of such a trifling nature that it might amount to an act of negligence on the part of the occupier of the land on which the nuisance existed not to take that step. In the present case it is sufficient to say that in my opinion there was an entire absence of any evidence that the plaintiffs either caused or continued (using that word in its widest sense) the nuisance, or were guilty of any negligence in relation to it.

Under these circumstances the plaintiffs were in my opinion entitled to judgment, apart altogether from the question whether they were exempt from liability under the Fires Prevention (Metropolis) Act, 1774, upon the ground that the fire was an accidental one. Mr. Vachell contended that

(1) [1911] 2 K. B. 633.

whatever may have been the cause of the original fire it ceased to be an accidental fire within the meaning of the statute when the plaintiffs were informed of it, and that within the reasoning of the decision in *Musgrove* v. *Pandelis* (1) the fire as from that date must be treated as a second and independent fire. I cannot draw any such inference from the facts of the present case. In *Musgrove* v. *Pandelis* (2) Lush J. drew from the facts the inference that there were in substance either two fires, the first an accidental one which did no damage, and the second which was due to negligence and did the damage; or alternatively that there was only one fire within the meaning of the statute, and that was the one due to negligence. This Court agreed with the view of the learned judge, but the facts of that case are very special, and have in my opinion no bearing upon the case we are now dealing with.

There is one point which Mr. Vachell made in his reply, and which I must not omit to deal with. He contended that having regard to the provisions of one of the special Acts of Parliament under which the defendant company was incorporated the nuisance complained of must be treated in law as a public and not as a private nuisance. In my opinion this contention is not well founded. In the result the appeal fails and must be dismissed with costs.

SCRUTTON L.J. If I correctly understand the question this appeal is intended to raise, it is one of some general importance, but it is not quite clear what the question is.

Adjoining the Birmingham Canal, owned by the canal company, is some land in fact belonging to Job Edwards, Ld., whom I call the landowners. This land was bought for mining, but could never be used for that purpose, and the landowners took no further interest in it. A third party conceived the idea that he had the right to tip rubbish on this land, and brought on to the land without the knowledge of the landowners large quantities of rubbish. Some of this caught fire, and began smouldering and increasing its extent

(1) [1919] 2 K. B. 43. (2) [1919] 1 K. B. 314.

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of fire. In May, 1920, there was doubt as to the boundaries of the canal company's and the landowners' land, but I think in fact the fire was then smouldering on the landowners' land only. It was obvious that if it extended to the canal it might do very serious damage. In October it appears to have just reached the canal company's land in one place, and the parties then made a very sensible agreement that work should at once be done by the canal company to stop the fire from spreading, and that the landowners should contribute half the cost, this work and contribution to be without prejudice to the question of liability on either side, which would be settled, as would the amount of liability, by proceedings. The landowners paid 500*l.*, and the work was done; but the canal company did not take any proceedings to recover the rest of the expense. The landowners were not content with this division of costs, but brought this action to recover their payment, whereupon the canal company claimed for the rest of the expense.

As the work was agreed to be done without prejudice to any question of liability, I take the question to be decided to be: Who would be liable if, no work being done, the fire had spread and damaged the canal company's property, the landowners from whose land it came, or the canal company, who either did nothing to stop it, or incurred expense to stop it? In other words, Was it the duty of the landowners to stop the fire from spreading to their neighbours' land, and, if so, what was the extent of that duty? Or was it the duty of adjoining landowners to take the steps necessary to stop the fire from spreading to their land?

It is, I think, clear that the rubbish which caught fire was not put on the landowners' land with the knowledge or assent of the landowners, or persons for whom they were responsible; it was put there by a trespasser. An attempt was made before us to say that the rubbish which originally caught fire was brought there by the canal company, who therefore could have no rights against the landowners. This was not alleged in the pleadings, and when at the trial it was suggested that it was relevant, counsel for the landowners

agreed with the judge's suggestion that knowledge by the canal company as carriers of the nature of the rubbish did not help him, and in consequence no further evidence was called as to where, and in what rubbish, the fire first broke out, and where the rubbish carried by the canal company between February and May, 1920, was being tipped. I am unable, in this state of things, in this Court to act on any specific state of facts as to the effect of the canal company's action as carriers.

I proceed to consider the questions of law: (1.) What is the extent of the liability of a landowner for a nuisance on his land which was not created by himself or those for whom he is responsible, and which may, by spreading, damage his neighbours? (2.) Whether the facts in this case bring him within the liability so ascertained; (3.) whether, this being damage by fire, he is excused by the Fires Prevention (Metropolis) Act, 1774, s. 86.

In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (1.) if he or his servants or agents created the nuisance; (2.) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment: *Black* v. *Christchurch Finance Co.* (1); (3.) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it: *Broder* v. *Saillard.* (2) I say "artificial nuisance," for he may not be liable for natural nuisances, such as thistles: *Giles* v. *Walker* (3); or weeds growing in a stream: *Hodgson* v. *Mayor of York.* (4) The point does not seem to have been considered as to trees not artificially planted, which grow over a boundary, probably because most boundary trees are artificially planted. The injured person has the remedy of abating the nuisance by his own action: after notice if it is necessary to trespass on the land of another to do so, and that other did not himself cause the nuisance; without notice if he can abate the nuisance

(1) [1894] A. C. 48.
(2) 2 Ch. D. 692, 700.
(3) (1890) 24 Q. B. D. 656.
(4) (1873) 28 L. T. 836.

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without leaving his own land, as in the case of trees: *Lemmon* v. *Webb*. (1) In *Jones* v. *Williams* (2), Parke B. includes in the cases where a right of abatement arises cases where the nuisance "was placed by another, and he" (the landowner) "omitted to remove it," and cases where the occupier was under an obligation by prescriptive usage or otherwise to cleanse the place where the nuisance was, and he omitted to discharge that obligation. A case of the latter class was *Humphries* v. *Cousins* (3), where the tenant of a house under which there ran an old drain through which by prescriptive right sewage flowed, was held liable for its leakage, though he did not know even of the existence of the drain. But I think a right to abate a nuisance does not exclude a right to bring an action for damage caused by the nuisance. In *Penruddock's Case* (4) it was resolved that the dropping of water in the time of the tenant from overhanging eaves not erected by him is a new wrong in that it is the permission of the wrong by the feoffor to continue to the prejudice of another, so that the person damaged shall recover damages if the tenant do not after request reform the nuisance; so in *Lemmon* v. *Webb* (5) Kay L.J. says: "The result of the authorities seems to be this: The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so." This was followed in *Smith* v. *Giddy* (6) by Wills and Kennedy JJ., who gave an action to a person damaged by trees overhanging his land, though he could clearly have abated the nuisance.

It is well established that for a dangerous thing brought on land by a trespasser the owner or occupier is not liable on the principle of *Rylands* v. *Fletcher* (7), that is as an insurer

(1) [1895] A. C. 1.
(2) (1843) 11 M. & W. 176, 181.
(3) (1877) 2 C. P. D. 239.
(4) (1598) 5 Rep. 100b.
(5) [1894] 3 Ch. 1, 24.
(6) [1904] 2 K. B. 448.
(7) L. R. 3 H. L. 330.

that it shall not cause damage, who is liable notwithstanding that he took due care to prevent the damage: see amongst other authorities the Privy Council decision of *Rickards* v. *Lothian*. (1) But I find considerable dicta that he may become liable if after action or knowledge he "permits or continues" the nuisance. In *Barker* v. *Herbert* (2) Fletcher Moulton L.J. says: "In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance; but the law recognizes that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it. An owner of premises may have a duty to prevent the continuance of the nuisance, but it is obvious that, just as, where the allegation is that he has caused the nuisance, it must be proved that it was there by his act or that of some one for whose action he is responsible, so, where it is alleged that he is responsible for the continuance of the nuisance, it must be proved that it was continued by his permission." Farwell L.J. says (3): "In my opinion a landowner is not liable for a nuisance caused, not by his own action, but by something done by another person against his will, subject to the qualification that he may become liable if he permits it to continue and fails to abate it within a reasonable time after it has come, or ought to have come, to his knowledge." There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has "permitted it to continue," and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under *Rylands* v. *Fletcher*. (4)

(1) [1913] A. C. 263, 279.
(2) [1911] 2 K. B. 633, 642.
(3) [1911] 2 K. B. 645.
(4) L. R. 3 H. L. 330.

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I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours. But it is said that the point has been decided the other way in *Saxby's Case*. (1) I find great difficulty in ascertaining the facts of that case. One Welch, in 1854, was the lessee of two factories from different landlords, each factory enjoying a right of drawing water from a natural stream called Todd's Brook. The defendants are described as "the proprietors" of Todd's Brook and had under statutory powers diverted part of the water to an artificial cut, made under statutory authority. The soil of the bed was vested in them; the land on both sides belonged to one of Welch's landlords, and the defendants were under an obligation to repair the banks. In 1854 Welch put into some point of the new cut a weir which diverted the flow of water from one of the works of which he was lessee to the other. Whether the banks between which he put the weir belonged at that point to his landlord Joddrell is not clear. The defendants apparently had nothing to do with the erection of the weir except that the soil of the bed belonged to them. In 1858 Welch assigned his lease of the mill, whose water supply was affected, to the plaintiff. In 1864 the plaintiff removed the weir to allow water to come to his land, under his right to be supplied. Shortly afterwards some one unknown put the weir back, whereupon the plaintiff sued the defendants, alleging that they obstructed and diverted the water. Mr. Mellish for the plaintiff argued that the owner in actual occupation of a continuing nuisance was liable though he did not put the nuisance there; he should not permit the continuance of the nuisance. I think two of the judges directly negatived this contention; the other two said there was no evidence that the defendants who did nothing "continued the nuisance." I think this case does decide that an owner or occupier is not bound to remove a nuisance which neither he nor those for whom he is

(1) L. R. 4 C. P. 198.

responsible created, even though by reasonable means he could abate it. But I think the case of the *Attorney-General* v. *Tod Heatley* (1) in the case of a public nuisance decides exactly the contrary. In that case there was a nuisance of filth put on the defendant's land by trespassers. The defendant did not cleanse the land, but said that any one affected might abate the nuisance. An injunction was granted against him at the suit of the Attorney-General. It was said that this was a case of a public nuisance. This is true, but what relevant difference does it make ? A person specially injured by a public nuisance may bring an action against the landowner who allows it to continue, as a person injured by a private nuisance may ; and it seems to me not sufficient in either case to say : " You may come in and abate it." In *Saxby's Case* (2) it looks as if the defendants had a duty to supply water or allow the supply of water to the plaintiff's mill, and yet allowed a nuisance to continue on their land which diverted the supply of water. This would be the same case as *Humphries* v. *Cousins* (3), and would be the second ground of liability recognized by Parke B. in *Jones* v. *Williams*. (4) *Saxby's Case* (2) has not been viewed with approval by text-writers. Sir F. Pollock (5) treats it as based on the fact that the defendant was not an owner in possession ; this may be so, but does not appear on the facts stated in the Law Reports. Salmond (6), whose discussion of the matter is the most helpful passage I have found, calls the case unsatisfactory, and queries its correctness. *Barker* v. *Herbert* (7), where it was sought to make the defendant liable for the malicious act of a trespasser on the ground of negligent guarding of a source of danger, failed because there was no evidence of negligence either in guarding the danger, or omitting to prevent the operation of the malicious act when known. I agree with Salmond that there is very little direct authority on the subject, but I think he correctly states

(1) [1897] 1 Ch. 560.
(2) L. R. 4 C. P. 198.
(3) 2 C. P. D. 239.
(4) 11 M. & W. 176.
(5) Pollock on Torts, 12th ed. (1923), p. 438.
(6) Law of Torts, 5th ed. (1920), pp. 258-265.
(7) [1911] 2 K. B. 633.

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the law in principle in s. 71, sub-s. 4, of his work. (1) "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement." This is the cause of action pleaded in para. 5 of the defence. But, in my opinion, the matter was not sufficiently investigated at the trial, nor are the facts sufficiently clear to enable us to deal with the case on these lines. It has not been ascertained, in view of the disputed boundary, when the landowners first knew that a danger was on their land, so as to have to consider how it could be reasonably abated. It has not been ascertained where at that time the fire was; and surely a landowner cannot be required to execute permanent works on another person's land, if he could not then stop the fire on his own land. Nor does the right to abate a nuisance allow third persons to execute permanent works on the land of another, although the nuisance is on that land. It may be that the landowner could with reasonable care stop part of the nuisance on his own land, but as to part the mischief was already done, and he could do nothing.

My conclusion on this part of the case is: (1.) that the landowner in possession is liable for a nuisance created by a trespasser, which causes damage to others, if he could, after he knows or ought to have known of it, prevent by reasonable care its spreading; but (2.) that as the facts on this part of the case have not been sufficiently investigated, and the judge has not applied the true principle of liability, there would have to be a new trial to decide on them and their legal effect.

But it is said that even if this is so the Fires Prevention (Metropolis) Act, 1774, prevents the defendants from having any liability. That statute (14 Geo. 3, c. 78, s. 86) provides that no action shall lie against any person in whose house or on whose estate "any fire shall accidentally begin." This

(1) 5th ed., p. 260.

fire undoubtedly began accidentally so far as the landowner and his agents were concerned. It has been decided that the statutory restriction of the previous common law liability does not exclude liability for fires caused by negligence of the owner or persons for whom he is responsible, or by dangerous things for which the owner is responsible under the doctrine of *Rylands* v. *Fletcher*. (1) This leaves the difficult question—suppose the fire is caused by a trespasser, as if he throws down a match; and suppose the owner comes by immediately afterwards, sees the small fire, and could with no trouble extinguish it by stamping on it, but does not do so, so that the fire spreads and damages his neighbour, is he freed by the statute? He is then aware of a dangerous thing on his land which may damage his neighbour, and which by reasonable care he can prevent from damaging his neighbour, and he does nothing. I agree he is not an absolute insurer of that dangerous thing, for he did not himself create it, but I think on principle he is bound to take reasonable care of a dangerous thing which he knows to exist. Take the case of an ordinary house fire, where a coal leaps from the grate. If no one knows of the fire caused by the coal till it cannot be stopped, that fire may be within the protection of the statute, though Duke L.J. doubted it in *Musgrove* v. *Pandelis*. (2) But suppose the owner sees it jump out, could extinguish it with a moment's trouble, and does not trouble to do so, could he plead the statute to protect him? In *Musgrove* v. *Pandelis* (3), where the real danger arose from the fact that the defendant's servant negligently did not turn a tap to stop a supply of petrol to a fire, the Court treated the fire as two fires; I should respectfully have thought that it was safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire. If that is so, the Act may not be a defence in this case, but again the questions of fact necessary to be determined to decide the question of negligent continuance of the fire have not

(1) L. R. 3 H. L. 330. (2) [1919] 2 K. B. 43, 51.
(3) [1919] 2 K. B. 43.

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been investigated. Some of these questions I have already indicated in the early part of this judgment; they would also include the question how far the fire was really continued by the contributory negligence of the canal company, what knowledge they had of the combustible character of the rubbish they were transporting as carriers, how far they were responsible for directing where it should be tipped, and what relation that place bore to the place where a fire was smouldering.

In my view therefore there should be a new trial of the whole action, and in view of the fact that full evidence was not given at the trial owing to the attitude taken by the canal company's counsel, I think the costs of this hearing and of the appeal should be referred to the judge who tries the case.

ASTBURY J. The facts upon which this case can in my judgment be decided are not, as I think, in dispute or in doubt, and have been stated by the learned judge in the Court below, and referred to by my Lord and Scrutton L.J., and I do not propose to further deal with them except as follows: The canal company had allowed tipping on its own land between the canal bank and the plaintiffs' property, and had long been aware that tipping was going on on the plaintiffs' land, and had been a party to it, in the sense of charging a wayleave rent to persons so tipping, for carting the refuse composing the tip over the canal bank and property on to the plaintiffs' land, and it was owing to the fact that the matter tipped upon the canal company's land adjoined that tipped on the plaintiffs' land, and was composed of what was believed to be combustible matter, that it became necessary for the canal company to take steps to insure that the fire, which subsequently broke out on the plaintiffs' tip, should not spread to the refuse or matter tipped upon its own property, and so reach and injure the canal bank. No reliance was placed by the plaintiffs at the trial upon the canal company's action in promoting or acquiescing in the creation of the tip on the plaintiffs' land, or the circumstances under which this was done; but the bare facts above stated, as distinguished from

the further and additional facts which might be proved on a new trial, if ordered, and which have been referred to by Scrutton L.J., were agreed or found by the learned judge as part of the facts in the case, or necessarily follow from what was so found or agreed, and were not challenged, as I understand it, by the appellants in this Court, and they cannot in my judgment be ignored merely because no point was made upon them in the Court below.

The question to be decided on this appeal is in my opinion whether the plaintiffs or the canal company are responsible for the cost of preventing the fire from spreading to and injuring the canal bank under the circumstances so found or admitted, and having regard to the issues raised in the pleadings. The plaintiff company's land had long been derelict, and it had no knowledge before 1920 that it had been used for tipping, but in May of that year it was made aware for the first time of this fact, and the interval between that date and October of the same year, when the arrangement was made for the defendant company to carry out such works as it thought necessary for the preservation of the canal, was taken up in ascertaining: (1.) whether the land in question was in fact the plaintiffs', or had been acquired by adverse possession by one Instone, who was responsible for the tipping and so claimed it; and (2.) how the tipping had been done without the knowledge or assent of the true owners. During this interval, and under these circumstances, the plaintiffs cannot in my opinion be said to have either suffered or permitted the continuance of the tip in question, or to have been guilty of negligence in not abating that which might subsequently grow to be a danger to the canal bank, if allowed to reach the defendants' property, covered as it was with combustible matter; nor did the plaintiffs in any way prevent or object to the defendant company taking such steps as it might think necessary to protect its property under the circumstances; and the mere fact that the tip on the plaintiffs' land had come into existence with the knowledge and concurrence of the defendants, and without the knowledge or assent of the plaintiffs, seems to me to be

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very relevant to the inquiry whether, in the circumstances above referred to, the defendant company in October, 1920, could have legally compelled the plaintiffs to prevent the fire in question so spreading as to become a danger to the canal bank, or have made it liable in damages for not doing so—there being no question of public nuisance to be considered; though I am of opinion that this appeal can be decided without having to rely upon any such conduct on the part of the canal company. In the pleadings the defendants allege participation in making the tip, and negligence on the part of the plaintiffs in respect of it, both before and after May, 1920, which in my judgment—the onus being on them—they have wholly failed to establish; and it is not without significance that the defendant company does not plead that the plaintiffs were otherwise under any obligation to it, at the date when the arrangement between the parties was made.

I now turn to consider whether on the agreed facts, and as contended by the appellants, the plaintiffs were under any legal liability to the defendants at the time when the said arrangement was made in October, 1920. The plaintiffs were protected by the Fires Prevention (Metropolis) Act, 1774, s. 86, in respect of this accidental tip fire, unless (inter alia) (1.) it was caused by the negligence of themselves, their agents, or those for whose acts they were responsible, which was not the case; or (2.) unless the tip was a dangerous thing brought by the plaintiff company upon its land within the principle of *Rylands* v. *Fletcher* (1), which is not alleged; or (3.) unless, as was contended for, there can be said to have been two fires, as was found to have been the case in *Musgrove* v. *Pandelis* (2), as to which the judgment of Bailhache J. seems to me obviously right; or, as I will assume, unless (4.) the plaintiff company after May, 1920, suffered or permitted a then existing nuisance to continue upon its property. As to the last possible or probable exception, I am of opinion, as I have said, that the facts do not warrant any such finding or assumption.

(1) L. R. 3 H. L. 330. (2) [1919] 2 K. B. 43.

This being so, the plaintiff company is, even apart from the defendants' conduct, and independently of any further facts which might be elicited on a new trial, entitled, in my judgment, on the agreed facts, to succeed under the provisions of the Act of 1774, and under the principle laid down in *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), which was accepted as good law, as I understand it, in this Court in *Barker* v. *Herbert.* (2) I may add that I think the law is correctly laid down in Clerk and Lindsell on Torts (3) in the following passage: "Where a person permits third parties to commit a nuisance upon premises of which he himself is in occupation at the time of the nuisance committed, the occupier permitting such acts of nuisance is responsible therefor, notwithstanding that they be not done on his behalf or for his benefit, and as a general proposition of law it is probable that an occupier of premises becomes responsible for the continuance of a nuisance thereon if it can be shown that it is in fact continued by his permission or with his conusance. But mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it."

For the reasons I have endeavoured to state, I am of opinion that this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Emmet & Co., for Wragge & Co., Birmingham.*

Solicitors for respondents: *Flux, Leadbitter & Neighbour, for Slater & Co., Darlaston.*

(1) L. R. 4 C. P. 198.
(2) [1911] 2 K. B. 633.
(3) 6th ed. (1912), pp. 455, 456; 7th ed. (1921), p. 419.

W. H. G.

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July 24.

ATTORNEY-GENERAL *v.* FORSIKRINGSAKTIESELSKABET NATIONAL (OF COPENHAGEN).

Insurance (Fire)—Reinsurance of Risks—Deposit with Paymaster-General—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, 23.

The Assurance Companies Act, 1909, is applicable to reinsurance business, as such business comes within the expression "the undertaking of liability under policies of insurance" in s. 1 of the Act.

Where, therefore, a foreign company carried on in the United Kingdom the business of reinsurance of fire risks:—

Held, that the company must deposit with the Paymaster-General the sum prescribed by s. 2, sub-s. 1, of the Act.

INFORMATION by the Attorney-General.

The information stated that the defendants from April 1, 1921, to March 31, 1922, had continuously carried on in the United Kingdom the business of fire insurance without having deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of 20,000*l.*, as required by s. 2 of the Assurance Companies Act, 1909, whereby they became liable under s. 23 to a penalty not exceeding 50*l.* per day. The information claimed the sum of 18,250*l.* (1)

The defendants were a Danish company registered under s. 274 of the Companies (Consolidation) Act, 1908. They carried on in the United Kingdom a direct business in marine insurance, and a reinsurance business for fire and marine risks.

The case was treated as a test case and only a nominal penalty was asked for.

Sir Douglas Hogg A.-G. and *Bowstead* for the Crown. The defendants, between the dates specified in the information, were carrying on fire reinsurance business in the United

(1) Assurance Companies Act, 1909, s. 1: "This Act shall apply to all persons or bodies of persons . . . . who carry on within the United Kingdom assurance business of all or any of the following classes: (*b*) fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

Sect. 2, sub-s. 1: "Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds."

Kingdom without having made a deposit with the Paymaster-General, as required by s. 2 of the Assurance Companies Act, 1909. Sect. 1 (*b*) provides that the Act shall apply to companies carrying on within the United Kingdom "the undertaking of liability under policies of insurance against loss by or incidental to fire." The defendant company come within those words, and they are therefore liable to penalties under s. 23.

[They referred to *Liquidators of Glasgow Assurance Corporation* v. *Welsh Insurance Corporation*. (1)]

Sir John Simon K.C. and *W. Blake Odgers* for the defendants. There is a wide difference between insurance and reinsurance business. For direct insurance business great skill and judgment are necessary in the acceptance of risks and the fixing of premiums. The Act of 1909 was intended to extend the protection given to holders of life policies to other kinds of insurance. Reinsurance business is not covered by the words of s. 1 (*b*) of the Act, and the defendants are therefore not liable to the penalties imposed by s. 23.

Bowstead replied.

BRANSON J. This is an information by the Attorney-General claiming from the defendants penalties under s. 23 of the Assurance Companies Act, 1909. I need not go into the facts in detail, because it is admitted that the defendants, under a reinsurance treaty, have been carrying on reinsurance business, and the whole question is whether reinsurance business comes within the purview of the Act of 1909. The case for the Attorney-General is that it does come within it, because it is an "undertaking of liability under policies of insurance" within the meaning of s. 1. The question which I have to decide is whether that is so, or whether reinsurance business is not insurance business at all within the meaning of the Act. It turns on a very fine point, but I have come to the conclusion that the expression is wide enough to include reinsurance business. When a company, under such a treaty as this, accepts liability defined

(1) 1914 S. C. 320.

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and measured by the terms of policies of insurance issued by other companies, it is undertaking liability under those policies within the meaning of s. 1 of the Act, and it is not necessary to read into the expression words to the effect that the liability shall be accepted to the policy holder direct. I think that provided the liability is measured, controlled and governed in every way by the terms of the policy, and only arises from the issue of the policy, it is a liability undertaken under the policy.

I have received some assistance from the case of *Liquidators of Glasgow Assurance Corporation* v. *Welsh Insurance Corporation* (1), in which Lord Hunter and Lord Guthrie came to a similar conclusion. Their decision is not binding upon me, but I regard it with the greatest respect. I have, however, formed my opinion independently, and, perhaps, on rather different grounds. My chief reason is based on the fact that if reinsurance of life and fire and other risks is not insurance business within the statute, there arises the extraordinary position that a company which is carrying on life or fire insurance business, and which at the same time is reinsuring another company's life or fire risks, must keep separate accounts in relation to them; and further, that a company which is empowered by its memorandum to carry on a life or insurance business could not reinsure a life or fire policy issued by another company, although one knows that it is done every day in the City of London. It seems to me that the statute cannot have contemplated such a severance of insurance and reinsurance business that insurance business should come within the Act and reinsurance business should be excluded from it.

That that is the true view seems to me to be clearly indicated, at least in one instance, by the Act itself. Sch. VIII., B. and C., para. 2 (*a*), contains an express direction that an underwriter carrying on fire and accident insurance or reinsurance business shall bring into one trust fund the premiums received from both classes of business, if he adopts the alternative provided for him by that part of the Schedule.

(1) 1914 S. C. 320.

It is, I think, impossible to suppose that the statute should direct that there shall be carried to one trust fund premiums, some of which arise from insurance business, and others from business which is not insurance business; and I think it follows that one should give to the words "the undertaking of liability under policies of insurance" the meaning which ex concessis they are wide enough to bear, and hold that they apply both to direct insurance and to reinsurance. The result is that the Attorney-General is entitled to succeed. This is a test case, and only a nominal penalty is asked for, which I assess at 50*l*.

Judgment accordingly.

Solicitor for Crown: *Solicitor to the Board of Trade.*
Solicitor for defendants: *W. G. A. Edwards.*

F. C.

[IN THE COURT OF APPEAL.]

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Nov. 21, 22.

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Poor Rate—Objection to Valuation List—Appeal to Quarter Sessions—Notice of Objection to Assessment Committee—Grounds of Objection—Sufficiency of—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *s.* 18—*Power of Quarter Sessions to adjourn Appeal—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4.

By s. 1 of the Union Assessment Committee Act, 1864, it is a condition precedent to the right of a ratepayer to appeal to quarter sessions against a rate made in conformity with the valuation list that he shall have given notice to the Assessment Committee of his objection to the list in the manner prescribed by the Union Assessment Committee Act, 1862, and by s. 18 of that Act a ratepayer who "feels himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation" is required to give the Assessment Committee "a notice in writing of his objection specifying the grounds thereof":—

Held, that a notice that the ratepayer objects to the valuation on the ground of unfairness or incorrectness without specifying the reasons why it is unfair or incorrect is a good notice for the purposes of s. 18, and on the hearing of an appeal he may urge any reason he pleases why it should be considered unfair or incorrect, unless he has intimated

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to the Assessment Committee that notwithstanding the general terms of his notice he only intends to object that it is unfair or incorrect for some specific reason, in which case he will be confined to the reason so specified.

A colliery company gave notice to the Assessment Committee that they objected to the valuation list on the ground that the rateable value of their colliery appearing therein was unfair and incorrect, but they raised no objection in the notice to the gross value. On the hearing of an appeal:—

Held, that the appellants were entitled to support their appeal on the ground that insufficient statutory deductions for repairs, insurance, etc., had been made from the gross value for the purpose of arriving at the rateable value.

Where a ratepayer appeals to quarter sessions under the Poor Relief Act, 1743, against an assessment, but fails to give to the (Assessment Committee) the reasonable notice required by s. 4 of that Act, and the justices in consequence adjourn the appeal to the next quarter sessions, they are not bound to hear the appeal at the sessions to which it is so adjourned, notwithstanding that the section says that "they shall . . . . then and there finally hear and determine the same," but may in the exercise of their inherent common law power further adjourn the appeal to succeeding sessions.

APPEAL from the decision of a Divisional Court on a case stated by the quarter sessions for the county of Durham.

1. At the Epiphany quarter sessions for the county of Durham, 1923, the above-named appellants appealed against a certain poor rate and a supplemental poor rate made by the overseers of the parish of Gateshead, wherein they were rated as the occupiers of a certain colliery called the Redheugh Colliery in the said parish at the sum of 2205*l.* as the gross estimated rental, and 2152*l.* as the rateable or net annual value. These figures had been in operation since April 1, 1915, and were included in the valuation list in force in the said parish at the time when the said rate was made.

2. The rate in question was made on April 13, 1921, and the supplemental rate on June 16, 1921, for the period ending March 31, 1922. The appellants on September 29, 1921, gave notice of objection to the valuation list in force in the said parish.

The notice, which was a printed form issued by the Assessment Committee for the use of ratepayers, was as follows:—

"To the Assessment Committee of the Gateshead Poor

Law Union and to the Overseers of the Parish or Township of Gateshead in the said Union: We hereby give you notice that we object to the valuation of the rateable hereditaments belonging to or occupied by us situate within the above-named parish or township and that the ground of our objection is that such valuation is unfair incorrect or excessive and illegal. The particulars of each assessment against which we intend to appeal are stated in the schedule below. We will attend and state the grounds of our appeal at the meeting of the Assessment Committee.

SCHEDULE.

No. of Assessment in Valuation or Supplemental Valuation List in force.	Name and Address of Appellant.	Situation of the Property rated.	Description of the Property rated.	Present Gross Estimated Rental in Rate Book.	Present Rateable Value.
					£ s. d.
13146	Owners of Redheugh Colliery, Ld.	168 Askew Rd., W.	Shop	(This column was left vacant)	12 10 0
7		166 „ „	Office and House		75 0 0
8		Redheugh Colliery	Coal, Rent, and Plant		2152 0 0
9		„ „	Stables		33 0 0
13577		Redheugh Hall	Rooms		11 0 0
8		„ „	„		11 0 0

Dated this 29th day of September, 1821."

On November 1, 1921, the objection was heard by the Assessment Committee, and was adjourned pending correspondence with the appellants and inquiries by the Committee's valuer. After several intermediate adjournments, although the appellants requested and were refused a further hearing before the Committee, the Committee on April 19, 1922, informed the appellants that they had decided to sustain the assessment at the sums above stated. No express objection was made to the said list either in the said notice or at the said hearing on the ground that the deductions made from the gross estimated rental in order to arrive at the rateable value of the said colliery were insufficient.

3. On June 13, 1922, the appellants gave notice of appeal to the ensuing quarter sessions, which were held on July 3, 1922.

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The grounds of appeal relied on in that notice were as follows :—

(1.) That the several hereditaments rated and described as hereunder are overvalued :—

SCHEDULE.

No.	Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Gross Estimated Rental.	Rateable Value of Buildings and Other Hereditaments, not being Agricultural Land.
					£ s. d.	£ s. d.
13146	Thomas Johnson		Shop and 2 Rooms	168 Askew Rd., W.	15 0 0	12 10 0
7	" "		Offices and House	166 Askew Rd., W.	90 0 0	75 0 0
8	Owners of Redheugh Colliery, Ld.		Coal, Rent, and Plant	Redheugh Colliery	2205 0 0	2152 0 0
9	" "		Stables	" "	40 0 0	33 0 0
13577		Owners of Redheugh Colliery	5 Rooms	Redheugh Hall	13 0 0	11 0 0
8		" "	5 Rooms	" "	13 0 0	11 0 0

(2.) That the assessments set out above are unfair, incorrect, excessive, and illegal.

(3.) That the principle upon which the annual value of the hereditaments is estimated is erroneous.

(4.) That the net values of the said hereditaments estimated are greater than the rents at which the same might reasonably be expected to let from year to year free from all usual tenants' rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

(5.) That sufficient deductions have not been made from the gross estimated rentals to arrive at the net annual values of the hereditaments.

No quarter sessions for the said county were held between April 19 and July 3, 1922. At the Midsummer quarter sessions, held on July 3, 1922, the appellants not having given

to the respondents the twenty-one days' notice previous to such quarter sessions required by s. 1 of the Union Assessment Committee Act, 1864, made application for their appeal to be entered and respited to the next sessions, which was done, the respondents on this occasion appearing by counsel and consenting to the respite. At the Michaelmas quarter sessions held on October 16, 1922, the appeal was by consent further respited to the Epiphany quarter sessions, 1923, on the appellants' application. No further or other notice of appeal than that of June 13, 1922, was given by the appellants.

4. When the appeal came on for hearing before the Epiphany quarter sessions, on January 3, 1923, objection was taken on behalf of the respondents, the Assessment Committee, that the Court had no jurisdiction to hear the appeal on the grounds :—

(1.) That the Midsummer quarter sessions, 1922, being the next practicable sessions to which the appeal should have been brought and the appeal having been entered at those sessions in default of due notice and respited to the next sessions—namely, the Michaelmas quarter sessions, 1922—in accordance with s. 4 of the Poor Relief Act, 1743, the justices were bound by that section then and there finally to hear and determine the same, and had no power further to respite the appeal to the Epiphany quarter sessions, 1923.

(2.) That twenty-one days' notice in writing is required by s. 1 of the Union Assessment Committee Act, 1864, to be given previous to the quarter sessions at which such an appeal is to be made, and such notice had not been given previous to the Michaelmas quarter sessions, 1922, or to the Epiphany quarter sessions, 1923.

5. The Court overruled both these contentions and proceeded with the hearing of the appeal.

6. The respondents further objected that in view of the fact stated in para. 2 (supra) the appellants were not entitled to raise in the appeal the question whether in the rate appealed against sufficient deduction was made from the gross estimated rental shown in the said rate in order to arrive

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at the rateable value thereof. The Court overruled this objection also.

7. The appeal was then heard; and the appellants adduced evidence to show:—

(1.) That upon the facts (apart from any deduction in respect of the matters referred to in para. 2 (supra) from the gross estimated rental appearing in the said rate) the net rateable value shown in the said rate for the said colliery was excessive; and

(2.) That in fact the deduction made from the gross estimated rental in order to arrive at the rateable value thereof was insufficient to represent the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the said colliery in a state to command the rent.

(3.) The appellants in opening their case did not either repudiate or accept the said gross estimated rental. In the course of the hearing the appellants gave evidence to show what the amount of the said statutable deduction should be, and that this amount deducted from the said gross estimated rental would reduce the net rateable value to a nominal figure. The respondents then stated that they admitted that the statutable deductions when deducted from the said gross estimated rental were more than sufficient to reduce the net rateable value to a nominal figure. Thereupon the appellants raised the contention appearing in para. 8 (2.).

8. Counsel for the appellants put forward two separate contentions:—

(1.) That the net rateable value was excessive apart from any consideration of the gross estimated rental as stated in the valuation list.

(2.) That in any case the net rateable value was excessive because the allowance of the statutable deductions from the gross to the net was insufficient, and therefore that in view of the decision in *Horton & Son* v. *Walsall Assessment Committee* (1) and in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (2), the amount of the net rateable

(1) [1898] 2 Q. B. 237. (2) [1915] 1 K. B. 763.

value could not exceed the amount of the gross estimated rental less the statutable deductions.

9. Counsel for the respondents admitted (as stated in para. 7 (3.) (supra)) that the probable average annual cost of the repairs, etc., was more than sufficient if deducted from the gross estimated rental to reduce the same to nil, but contended and called evidence to show that the rateable value shown in the said rate was in fact correctly estimated according to the definition contained in s. 1 of the Parochial Assessment Act, 1836, and that the gross estimated rental there shown was not excessive. They further contended that the appellants were not entitled in law in the circumstances hereinbefore appearing, as they had not accepted the gross estimated rental shown in the said rate as correct, to have the rateable value calculated therefrom in the manner indicated in para. 7 (2.) (supra).

10. The Court held that they were bound by the decision in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1), to accept the contention of the appellants stated in para. 8 (2.) (supra), but found that if they were not so bound the rateable value shown in the said rate was a proper one. Holding themselves so bound, they reduced the rateable value of the said colliery to the sum of 1*l.* while allowing the gross estimated rental of 2205*l.* to stand unaltered, and allowed the appeal with costs subject to the stating of this special case.

11. The questions for the opinion of the Court were: (1.) Whether the Court of quarter sessions were right in overruling each of the two contentions of the respondents set out in para. 4 (supra) and in holding that they had jurisdiction to hear the appeal. (2.) Whether, if so, they were right in holding that the appellants were entitled to raise the question of the sufficiency of the deductions made from the gross estimated rental in order to arrive at the rateable value. (3.) Whether if they were right on questions (1.) and (2.) they were right in holding that they were bound by the decision in *Hendon Paper Works Co.* v. *Sunderland*

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Assessment Committee (1) to reduce the said rateable value to 1*l.*

12. If all the said questions were answered in the affirmative, the decision of quarter sessions was to stand; if any of the questions were answered in the negative, the rateable value shown in the said rate was to be restored and the appeal was to be dismissed with costs. The Court was requested to make such further or other order as it should think fit.

The Divisional Court (Lord Hewart C.J., Avory and Greer JJ.) held that the quarter sessions having adjourned the appeal to the Michaelmas sessions were entitled further to adjourn it to the Epiphany sessions notwithstanding the language of s. 4 of the Poor Relief Act, 1743, and that they had consequently jurisdiction to hear the appeal at the latter sessions. They also held that the notice of appeal given on June 13, 1922, was a good notice for the succeeding Michaelmas and Epiphany sessions. But on the question whether at the hearing of the appeal the appellants were entitled to raise the point that insufficient deductions had been made from the gross value to arrive at the rateable the Court were divided, Lord Hewart C.J. and Avory J. holding that they were not, and Greer J. that they were.
The appellants appealed to the Court of Appeal.

E. Page K.C., *Mortimer K.C.* and *Simey* for the appellants. The notice to the Assessment Committee of the appellants' objection to the valuation list was sufficient. It was an objection to the rateable value only. The appellants did not object to the gross value. In their notice they left the gross value column blank. That being so the sessions had no jurisdiction to consider the correctness of the gross value: *Reg.* v. *London Justices.* (2) And under those circumstances the objection could have no other meaning than that the proper statutory deductions had not been made from the gross value, and therefore it is immaterial that the notice did not in terms refer to the deductions. The proper method of arriving at the rateable value is to find the gross first and

(1) [1915] 1 K. B. 763. (2) [1897] 1 Q. B. 433.

then make the deductions for repairs, etc., therefrom. It is expressly so provided in the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1, the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 15, and the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4. Though no doubt it is a common practice to find the rateable value first and then add the cost of repairs, etc., to get the gross: *Horton & Son* v. *Walsall Assessment Committee* (1); and especially is that the case with collieries: *Denaby and Cadeby Collieries* v. *Doncaster Assessment Committee*. (2) But it does not matter which is taken first provided that one of the two is agreed and the proper amount of the deduction is agreed also. Here the gross value, whether it was arrived at first or not, cannot now be disputed. But it does not follow that, because the deduction of the statutory allowance for repairs would reduce the rateable value of this colliery to a nominal sum, there must necessarily be a mistake about the gross value. If a colliery is a losing concern the owner may well be glad to let it at a nominal rent to any one who will take it off his hands. The fact that the notice to the Assessment Committee was in general terms complaining of the unfairness and incorrectness of the valuation did not render it open to objection: *Rex* v. *West Ashford Union*. (3) Lord Alverstone there said that a notice that the ratepayer's assessment "is too high" is a good notice. The notice here was wide enough to cover the insufficiency of the statutory deductions.

Konstam K.C. and *Mundahl* for the respondents. It is well recognized as an essential preliminary to an appeal to quarter sessions that there should have been a plain statement of the relief desired and of the grounds upon which it is asked for. Here the notice states as the only ground of objection that the valuation is "unfair incorrect excessive and illegal," the first three words being in print and the last in writing. It cannot be suggested that the respondents by sending the appellants a printed form of

(1) [1898] 2 Q. B. 237. (2) (1898) 62 J. P. 343.
(3) (1907) 2 Konstam's R. App. 624.

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notice to fill up misled them into the belief that they need not make a fuller statement of the grounds of objection, for the appellants recognized its insufficiency by adding the word "illegal" in writing. Sect. 18 of the Act of 1862, by requiring that a ratepayer who is aggrieved by the "unfairness or incorrectness" of a valuation list shall give "a notice in writing of his objection specifying the grounds thereof," imports that the statement of the grounds must be something more specific than a mere allegation that it is unfair or incorrect. Similarly under all statutes allowing an appeal to quarter sessions it is a condition precedent to an appeal to quarter sessions that the appellant shall have stated the grounds of his appeal with sufficient particularity to let the respondent know what case he has got to meet. In *Rex* v. *Oxfordshire Justices* (1) a notice of appeal against a bastardy order stated that the appellant intended to appeal against an order "whereby I was adjudged to be the father of a bastard child born on the body of E. R. and chargeable to the parish of S." It was held that the notice did not sufficiently set out "the causes and matters of the appeal" as required by 49 Geo. 3, c. 68. It was consistent with the notice that the appellant was only going to contend that the child was not born in the parish of S., and the justices were consequently right in refusing to hear the appeal. In *Rex* v. *Derbyshire Justices* (2) a notice of appeal against an order of removal stated as the grounds of the appeal that the pauper had gained a settlement in the respondent parish by hiring and service for a year, and by having served several years under a general hiring, but did not specify the dates or the names of the parties. It was held to be an insufficient notice within s. 81 of 4 & 5 Will. 4, c. 76, which required a statement in writing of the grounds of the appeal. Littledale J., delivering the judgment of the Court, said: "The clauses in this Act respecting the grounds of removal and appeal are intended to compel such a disclosure, by both parties, as will enable them to go to the sessions fully aware of the questions which are to be discussed; and we think that

(1) (1823) 1 B. & C. 279. (2) (1837) 6 Ad. & E. 885, 893.

we best effectuate such intention by holding that the statements must not be in general terms, but must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of enquiry." Secondly, the appellants are not entitled to insist that the gross value is correct unless they accepted it in their notice of objection to the Assessment Committee, that is to say, unless they said in that notice that their objection to the sufficiency of the statutory deductions was their only objection. In *Denaby and Cadeby Collieries* v. *Doncaster Assessment Committee* (1) it was indeed held that where the gross value of a mine is entered at the same figure as the rateable, the occupiers are entitled to accept the gross value as being the true gross value, and to make deductions therefrom to arrive at the rateable. But there the appellants stated in their notice that they accepted the gross value. In all the cases in which an objection has been allowed to the deductions the appellants formally accepted the gross value. This was the case in *Horton & Son* v. *Walsall Assessment Committee.* (2) In *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (3), by an agreement between the appellants and the Assessment Committee, the net rateable value was fixed at a certain figure to which 50 per cent. was added to arrive at the gross value, and it was held by the Court of Appeal that as there was nothing in the notice to the Assessment Committee informing them that the appellants proposed to go back from the agreed convention, they could not insist that the fictitious gross value so arrived at was the real sum.

The quarter sessions had no jurisdiction to hear the appeal at the Epiphany sessions. Under s. 4 of the Poor Relief Act, 1743, if a reasonable notice of appeal, now a twenty-one days' notice, is not given to the respondents the justices are to "adjourn the appeal to the next quarter sessions and then and there finally hear and determine the same." Insufficient notice having been given

(1) 62 J. P. 343. (2) [1898] 2 Q. B. 237.
(3) [1915] 1 K. B. 763.

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for the Midsummer sessions the justices properly adjourned the appeal to the Michaelmas sessions, but they ought to have heard the appeal at those sessions: they had no jurisdiction to adjourn it further. A second objection to the jurisdiction of the quarter sessions is that s. 1 of the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), having required the giving to the Assessment Committee of a "twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal" as a condition precedent to the hearing of the appeal, the appellants here failed to give such a notice. The words "quarter sessions to which such appeal is to be made" mean "the sessions at which the appeal is in fact heard": per Sir Gorell Barnes P. in *Rex* v. *West Riding of Yorkshire Justices*. (1) That in this case meant the Epiphany sessions. The appellants ought to have given a fresh notice for those sessions.

BANKES L.J. This is an appeal from a Divisional Court upon a special case stated by the quarter sessions of the county of Durham. The case deals with a number of points, some in the nature of preliminary objections to the jurisdiction of the quarter sessions, and others relating to the right of the appellants to raise certain questions in support of their appeal. The Divisional Court differed in opinion, Greer J. thinking the quarter sessions had taken the right view on all the points, the Lord Chief Justice and Avory J. thinking that the quarter sessions were right on the preliminary objections, but wrong on the points of substance.

The questions arise under the statutes relating to rating. Sect. 1 of the Union Assessment Committee Act, 1864, now regulates the right of appeal to quarter sessions from the Assessment Committee; it provides that "No person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed

(1) [1908] 2 K. B. 635, 641.

to obtain such relief in the matter as he deems just." In order to see what kind of notice of objection that section requires one has to turn back to s. 18 of the Union Assessment Committee Act, 1862, which provides that "Any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and the overseers a notice in writing of his objection, specifying the grounds thereof." It is quite plain that the section itself indicates what the general grounds of objection are—the "unfairness or incorrectness in the valuation of any hereditaments," and all that it requires is that he should specify the grounds of his objection. In my opinion a person who gives a notice specifying as the grounds of his objection that he complains of the "unfairness" or "incorrectness" in the valuation of any hereditaments included therein gives a notice which complies with the requirements of the section. I do not understand it to be seriously contended that a notice which contains no other grounds than those is other than a good notice, in the sense that it is a notice which entitles the complainant to have a decision from the Assessment Committee upon that objection. If he has given a notice in that general form he may either attend before the Committee to support his case, or he may refrain from doing so, and so far as I know there is no obligation upon a person who has given a notice of objection to attend before the Assessment Committee; but if he does not attend, the Committee are in my opinion none the less bound to deal with the objection. If the committee decide against the objection there seems to me to be no reason why the objector should not be entitled to appeal to the quarter sessions, and on such appeal urge any ground of objection which was covered by the general words of the notice. If the objector does attend before the Assessment Committee he may, either expressly or impliedly,

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by his conduct limit his general objection to some particular point and, while urging that particular objection, may indicate that it is his only objection. In that event it would be open to the Assessment Committee at the quarter sessions to say that although the appellant had in the first instance given a general notice of objection he had, when appearing before the Committee, limited his grounds of objection to one particular point, and consequently ought not upon the hearing of the appeal to be allowed to travel beyond that particular point. I think it is clearly established that an appellant at quarter sessions who is appealing against a rate cannot raise matters on the appeal which were not raised before the Assessment Committee. *Williams* v. *Bedminster Union* (1) is a direct authority for that proposition. There the notice of objection to the Assessment Committee stated that the valuation list was bad as not being based on a true estimate of the annual value of the property. The objection was limited to the amount. The Assessment Committee having refused relief the objector appealed and raised at quarter sessions an entirely different case—namely, that the hereditament was not rateable at all. The quarter sessions allowed the appeal on that ground. But the Court (Lush and Archibald JJ.) reversed their decision on the ground that "the particular objections raised on appeal to the quarter sessions must previously be brought before the Assessment Committee." In the present case the appellants appeared before the Assessment Committee, but the statement of the facts in para. 2 of the case leaves it very much in doubt what took place when they got there. We have been told that what really occurred was that the appellants there objected, not to the insufficiency of the statutory deductions, but to the fact of the colliery being assessed on a conventional system adopted in the district for rating collieries. If the appellants had been given the fullest opportunity of stating their case, and had taken no further point, they could not afterwards have raised the question of the insufficiency of the statutory deductions on the hearing of the appeal. But in my opinion if an Assessment Committee desire at quarter

(1) (1874) 30 L. T. 710, 712.

sessions to contend that any particular point is not open to the appellant, because it was not taken before the Committee either in the formal notice or subsequently in argument, it lies upon them to prove that the appellants had the fullest opportunity of stating all the points that they desired to state, that they stated them, and that this particular point was not included. Here the respondents are not in a position to prove that, for they refused the appellants a further hearing. The respondents conceded that if the appellants had accepted the gross value appearing in the valuation list it might have been open to them to raise the argument which they did, but that as their original notice to the Assessment Committee contained no reference to the gross value it was not open to them to do so. I do not think there is any substance in that contention. By omitting any reference to the gross value they practically said that they raised no objection to it, which to my mind is the same thing as saying that they accepted it.

Among the questions which are asked in the special case is the question whether the quarter sessions were right in thinking that they were bound by the decision in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1), that the Assessment Committee are not entitled to call evidence to show that the gross estimated rental which they have themselves inserted in the valuation list is too low. In my opinion they clearly were so bound. It has been too long established that where an appeal is made against the rateable value appearing in the valuation list the Assessment Committee cannot support the figure by altering the amount of the gross value. Whether that rule works fairly is a matter which I think deserves consideration, but if any alteration of it is to be made it must be by legislation.

In conclusion on this part of the case I may say that it seems to me that the form of notice of intention to appeal which is issued by this Assessment Committee realizes that a general notice in the terms of the statute is quite sufficient to require them to deal with a notice so given, for it goes on

(1) [1915] 1 K. B. 763.

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to invite the objector to come before them and give more definite details of the objection which he makes, an invitation which, as I have already said, he is under no obligation to accept.

So far I have dealt with the subject of the main contention in this appeal. It remains to deal with the preliminary objections. With regard to the objection that the notice which was in fact given, and which was not a twenty-one days' notice for the Midsummer sessions, could not be treated as a valid notice for the Michaelmas sessions, it is enough to say that the decision of the House of Lords in *Denaby Overseers* v. *Denaby and Cadeby Collieries* (1) is a direct authority against such a contention. The other objection was that because the statute of 1743 says that if reasonable notice of intention to appeal is not given to the overseers the justices "shall adjourn the said appeal to the next quarter sessions and then and there finally hear and determine the same," the justices having here adjourned the appeal to the Michaelmas sessions were bound to decide the case at that sessions, and could not further adjourn it. In my opinion it would require much stronger language than the statute uses to take away the common law right of the Court of quarter sessions to respite the appeal to the Epiphany sessions. For these reasons I think that the appeal must be allowed, and the questions in the special case must be answered in the affirmative.

SCRUTTON L.J. This is an appeal from a Divisional Court, which by a majority reversed a decision of the Durham quarter sessions. The fact that there was a difference of opinion in the Court below shows that it is a matter of some difficulty. When the case came before the quarter sessions two preliminary objections were taken to the jurisdiction of the sessions to hear the appeal. My Lord has dealt with them, and I do not propose to add anything on that subject. I then come to the more difficult question relating to the merits. When the case was before the sessions objection was taken that the appellants, who gave notice to the

(1) [1909] A. C. 247.

Assessment Committee of intention to appeal against the rateable value, but said nothing in their notice about any objection to the gross value or about the insufficiency of the statutory deductions, were not entitled to raise the point that if the proper deductions had been made from the gross value appearing in the valuation list the result would have been a much smaller figure than that of the rateable value appealed against. The quarter sessions decided against that objection. The Divisional Court held that it was good. The question turns on s. 18 of the Union Assessment Committee Act, 1862, which says that: "Any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditament included therein, or on the ground of the omission of any rateable hereditament from such list, may . . . . give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof." There is no doubt that where Acts of Parliament have said that a notice of appeal must specify the particular grounds of the appeal, the Courts have shown a tendency to hold that the notice must inform the respondents distinctly of the objections that they must be prepared to meet. Of that *Rex* v. *Sheard* (1) and *Rex* v. *Oxfordshire Justices* (2) are illustrations; but in neither of the Acts to which those cases relate is there anything corresponding to the language of s. 18 of the Act of 1862, which begins by stating the three general grounds of grievance, and then says that the notice of appeal must specify the grounds of objection. It appears to me that in a notice of appeal under s. 18 it would be enough to state as the objection that the rateable value is incorrect, and under that notice the objector could urge any reasons he thought proper as to why it was incorrect. Mr. Konstam for the Assessment Committee indeed conceded that on such a notice the incorrectness of the rateable value may be proved in a variety of ways, notwithstanding that they were not mentioned in the notice. At the same time I think that we should as far as possible interpret the section so as to provide that a point

(1) (1824) 2 B. & C. 856. (2) 1 B. & C. 279.

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Scrutton L.J.

not taken before the Assessment Committee should not be taken on appeal, and if the notice were that the valuation is incorrect because of reason A, the appellant would not be entitled at the sessions to set up that it was incorrect because of reason B. That is the effect of the decision in *Williams* v. *Bedminster Union*. (1) I think also, though it is not necessary to decide it, that if an appellant, having given a general notice of objection to the valuation on the ground of incorrectness, were to attend before the Committee and say that his reason for attacking the correctness of the valuation was reason A, he could not be heard to object at the sessions that it was incorrect for reason B, which was not mentioned before the Assessment Committee. As to what happened before the Committee the special case leaves us very much in the dark. It does not tell us what arguments were urged on behalf of the appellants to show that the assessment was unfair or incorrect, but it says in para. 2 that the hearing was adjourned, and that although the appellants asked for a further hearing upon some unspecified point they were refused it by the Committee. If the Committee desire on the hearing of the appeal to shut the appellant out of some particular ground of appeal, they must show that the appellant limited himself, either in his written notice or what took place before the Committee itself, to some ground of appeal other than that from which they wish to shut him out. Here the appellants had not up to the time when they were refused a further hearing done anything to so limit themselves. Under these circumstances I am of opinion that the judgment of Greer J. in the Court below was the right one.

There is one further matter to which I must refer, which is as to the effect of *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (2) upon the merits of the case. The quarter sessions say that in truth and in fact the rateable value appearing on the valuation list is perfectly correct; it is the gross value that is wrong; but they are unable to alter the gross value, for nobody has appealed against it; and having to start with the assumption that the

(1) 30 L. T. 710.

(2) [1915] 1 K. B. 763.

gross value is correct, and having had the proper amount of the statutory deductions proved before them, they have no alternative but to reduce the rateable value to a nominal figure, in disregard of what they know the justice of the case to demand. A very unsatisfactory result, but it is one which can only be dealt with by legislation. The statutes and authorities being what they are, the quarter sessions were bound by the decision in the *Hendon Paper Works Case* (1), and were compelled to assess the rateable value of this colliery at the absurd figure of 1*l*. For these reasons I agree that the appeal should be allowed.

ATKIN L.J. I am of the same opinion. This is a case in which a technicality relied on by the appellants is met by technicalities set up by the respondents, and to my mind the technicality relied on by the appellants is one to which we must give effect, the others not being sound. The technicality relied on by the appellants is that inasmuch as a gross value has been put upon their colliery in the valuation list, which gross value they have not appealed against, it is binding on the respondents, and in those circumstances no rateable value can be allowed to be good which is inconsistent with the proper statutory deductions having been made from the gross value so appearing. That is a technicality in the sense that it leads to a result which has no relation to the true rateable value. On the other hand the respondents, in order to get rid of that difficulty, rely on several technicalities, the most important of which is the contention that as this point was not raised either in the original notice of objection or at the hearing before the Assessment Committee, it could not be entertained before the quarter sessions. That brings me to the consideration of the conditions precedent to an appeal to quarter sessions. The jurisdiction, it is to be remembered, is purely statutory, and it is to my mind undesirable to depart from the plain meaning of the statute. The conditions laid down in s. 1 of the Union Assessment Committee Act, 1864, are that notice of objection must have

(1) [1915] 1 K. B. 763.

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been given to the Assessment Committee, and the appellant must have failed to obtain such relief as he deems just. The notice of objection is to be a notice given "in the manner prescribed by the said Act"—the Act of 1862—"with respect to objections," that is to say, it is to be in the same form and on the same conditions as the notice of objection prescribed by s. 18 of that Act, with this further condition, which has been added by judicial interpretation, that no ground of objection can be taken on the appeal to quarter sessions which is not covered by the notice of objection given to the Assessment Committee. That is the first question that arises, and upon that it appears to me that a notice of objection in general terms that the rateable value is "incorrect" is a valid notice of objection within the provisions of s. 18. Indeed I think it was eventually admitted by Mr. Konstam that a ratepayer, who gives notice to the Assessment Committee in general terms that he objects to the valuation list on the ground that his rateable value is incorrect and says nothing more in his notice, can afterwards come before the Assessment Committee and give particular reasons why he alleges the rateable value to be incorrect. Therefore so far as the words of the statute are concerned it appears to me that in this case the appellants have complied with the condition precedent as to giving notice, and it is plain that they have failed to obtain the relief which they deemed just. But a further point was made by Mr. Konstam, who said that, even if the words of the statute were satisfied, and the special ground urged on the appeal to quarter sessions was covered by the written notice of objection, still the Court ought to hold that unless that special ground was in fact mentioned at the hearing before the Assessment Committee it could not be relied upon at the sessions. I do not think it necessary to determine that matter in this case, for here the Assessment Committee refused the appellants the further hearing which they asked for, and so prevented them from taking the points which they desired to take and which may have included this very point of the insufficiency of the statutory deductions made, and therefore I think it was impossible for the

Assessment Committee to rely on an objection that the point was not expressly taken before them. That seems to me to dispose of the matter, because I agree that the quarter sessions were bound by the decision of this Court in the *Hendon Paper Works Case* (1), that it was not possible to attack the gross value at the sessions, there having been no appeal against the gross value.

On the question of the preliminary objections to the jurisdiction of the quarter sessions to hear the appeal I desire to say nothing, except that I agree with the decisions given both by the Divisional Court and by the other members of this Court, that those objections fail for the reasons given by them. I agree therefore that the appeal should be allowed and the questions in the case answered in the affirmative.

Appeal allowed.

Solicitors for the appellants: *Crossman, Block & Co., for Murray & Richmond, Newcastle-on-Tyne.*

Solicitors for the respondents: *Maples, Teesdale & Co., for Lambert & Lambert, Gateshead.*

(1) [1915] 1 K. B. 763.

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Nov. 15, 16, 29, 30; *Dec.* 1, 17.

[IN THE COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* WESTLEIGH ESTATES COMPANY, LIMITED.

SAME *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

SAME *v.* ECCENTRIC CLUB, LIMITED.

Revenue—Corporation Profits Tax—"British company carrying on any trade or business, or any undertaking of a similar character"—Company formed for more convenient Management of Family Estates—Railway Company merely in receipt of Annual Payment in Consideration of Funds and Materials supplied for Construction of Railway—Company carrying on Social Club—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 52, *sub-s.* 2 (*a*); *s.* 53, *sub-s.* 2 (*h*).

Sect. 52, sub-s. 1, of the Finance Act, 1920, imposes a duty called "corporation profits tax" on certain profits. Sub-s. 2 of the same section provides that "the profits to which this Part of this Act applies are . . . . the following, that is to say—(*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments. . . . ." By s. 53, sub-s. 2 (*h*), it is enacted that "profits shall include in the case of mutual trading concerns the surplus arising from transactions with members. . . . ."

A limited company was formed for the purpose of more conveniently administering an estate which had become vested in a large number of beneficiaries, and it duly performed this function. Its revenue was derived from leases of land and mines, and as the leases fell in the company renewed them. The company never worked the land or the mines:—

Held, that the company answered the description of "carrying on any trade or business or any undertaking of a similar character," and was therefore liable to corporation profits tax.

Decision of Rowlatt J. [1923] 2 K. B. 514 reversed.

In 1895 a railway company entered into a contract with the Secretary of State for India under which the company was to provide funds, material, and equipment for a railway to be constructed by another company, and was to receive as remuneration a certain percentage of the gross earnings of the railway, which was to be worked and managed by the Secretary of State. The railway having been constructed the parties in December, 1906, entered into a supplemental contract under which the railway company in effect, as from January, 1906, made an out and out sale of the railway to the Secretary of State in consideration of a perpetual annuity of 30,000*l.* commutable at the option of the Secretary of State into a lump sum at any one of certain intervals.

Held (by a majority of the Court) that the company likewise answered the above description, and was therefore liable to corporation profits tax.

Decision of Rowlatt J. [1923] 2 K. B. 514 reversed.

A company limited by guarantee carried on a social club in the ordinary way, the club being a members' and not a proprietary club. By the memorandum of association profits were not distributable among the members nor, in the event of the winding up of the company, was any surplus distributable among them, but was to be applied as the committee might determine. Payments were made by members for services they received at the club premises, such as the provision of meals, etc. For the year in question the company's account showed a surplus of income over expenditure.

Held, that the company was not carrying on an "undertaking of a similar character" to that of a trade or business, and was therefore not liable to corporation profits tax.

Decision of Rowlatt J. [1923] 2 K. B. 514 reversed.

APPEALS from three decisions of Rowlatt J. (1) on cases stated under the Finance Act, 1920, s. 56, sub-s. 6, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

INLAND REVENUE COMMISSIONERS *v.* WESTLEIGH ESTATES COMPANY, LIMITED.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on November 29, 1921, for the purposes of hearing appeals the Westleigh Estates Company, Ld. (hereinafter called "the company") appealed against an assessment to corporation profits tax in the sum of 190*l.* for the accounting period ending June 30, 1920, made upon it by the Inland Revenue Commissioners under the provisions of the Finance Act, 1920, Part V.

The company claimed exemption from the provisions of corporation profits tax as contained in the Finance Act, 1920, Part V.

The company was formed in August, 1900, to acquire the interests of the persons hereinafter mentioned in certain freehold estates (hereinafter referred to as "the property") in the Manchester district. The nominal capital of the company consisted of 96,000*l.* ordinary stock, of which 94,833*l.* 6*s.* 8*d.* was issued.

(1) [1923] 2 K. B. 514.

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The objects of the company as set out in cl. 3 of the memorandum of association were (inter alia) as follows :—

"(*a*) To acquire and take over certain real estate and rent charges, subject to the leases and agreements for tenancies of some part thereof already granted, situate in or issuing out of land in Westleigh and Hindley in the county of Lancaster or the majority of the undivided shares therein, and with a view thereto to enter into the agreement referred to in cl. 3 of the company's articles of association and to carry the same into effect with or without modifications.

"(*b*) To acquire and take over from time to time any shares in such real estate and rentcharges not comprised within the said agreement.

"(*c*) To grant leases for any term of years or from year to year and whether absolute or determinable of all or any part of the property of the company whether with or without the concurrence of the owner or owners of any other undivided shares or share herein, in consideration of such royalties, rents or reservations as the company may think fit.

"(*d*) To purchase, take on lease or in exchange hire or otherwise any real and personal property and any rights and privileges which the company may think necessary or convenient for the purposes of its property or business, and in particular, any land, buildings, easements, machinery, plant, stock in trade.

"(*e*) To sell, improve, repair, manage, develop, exchange, lease, mortgage, farm or work as market gardens, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company.

"(*f*) To invest and deal with the monies of the company not immediately required upon such securities and in such way as may from time to time be determined."

The property was formerly owned by two brothers, J. Hall and W. Hall, who both died many years ago. At the date of the incorporation of the company about twenty-four persons were beneficiaries under the will of J. Hall and became entitled to his share of the property. Mrs. Bubb, the daughter of W. Hall, became entitled to the whole of the latter's share of the property under his will.

In view of the great number of beneficiaries entitled under the wills and the diversity of their interests it was considered desirable that Mrs. Bubb and the beneficiaries under J. Hall's will should agree to pool their interests and to place the control of the property in the hands of a limited company; and accordingly the property was conveyed by the beneficiaries to the company. The agreement was dated August 20, 1900, the consideration for the conveyance being the issue to the beneficiaries of stock in the company. Mrs. Bubb and the beneficiaries under J. Hall's will received fully paid shares in proportion to their respective interests.

At the hearing before the Special Commissioners the following facts were proved or admitted:—

(*a*) The company took over the property exactly as it stood under the wills of J. and W. Hall. When so taken over the greater part of the property (which was coal-bearing land) was in lease to colliery owners, so that the company acquired the reversions, while as to the unlet remainder the company acquired the freehold in possession.

(*b*) No land was ever purchased by the company other than that obtained under the agreement of August 20, 1900.

(*c*) No land was sold by the company except (1.) an inn sold in 1910 for 1050*l.* owing to a difficulty with regard to licensing and (2.) a small piece of land sold for 310*l.* in 1905 to the Leigh Corporation for public purposes.

(*d*) The company's revenue was derived from rents from surface and mining leases.

(*e*) The minerals had been worked by various lessees under leases several of which had still many years to run. On their expiration leases had been renewed or fresh leases granted to the same lessees. The company never itself worked any of the mines.

(*f*) Mrs. Bubb held half the shares in, and her husband was a permanent director of, the company. Shares could only be transferred among the existing shareholders and their families. (1)

(1) This was so stated by the Commissioners in the case, but is incorrect. The articles gave a right of pre-emption to the existing

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On behalf of the company it was contended: (1.) that the company was not carrying on a business or any undertaking of a similar character, and (2.) that where no trade or business was carried on the mere holding of investments was not an undertaking of a character similar to a trade or business and was not sufficient to bring the company within the provisions of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920. (1) To involve the profits of an undertaking of a character similar to a trade or business to liability under this section the undertaking must be one in which there had been activities of a business character in the way of change of or dealings in investments, and that in this case there were no such activities. The property did not constitute an investment within the meaning of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920.

On behalf of the Inland Revenue Commissioners it was contended (1.) that the company was in fact at all material times carrying on a trade or business or undertaking of a similar character; (2.) that the company was at all material times carrying on a trade or business or undertaking of a similar character within the meaning of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, for the reason (3.) that the mere holding of investments was sufficient to bring the company within the provisions of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920; and (4.) that the company held an investment within the meaning of the section.

The Special Commissioners held as a fact that the company was not carrying on any trade or business or any undertaking of a similar character, and although they considered that the company held investments they were of opinion that the words in the statute did not operate to tax profits derived from investments held by a company which did not in some

shareholders and their families, but, subject to that right, imposed no restrictions on the sale and transfer of the shares.

(1) Sect. 52, sub-s. 2, of the Finance Act, 1920, enacts that "the profits to which this Part of this Act applies are . . . . the following, that is to say—(*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments. . . . . "

way trade or carry on business, whether in connection with the holding of investments or otherwise. Accordingly they discharged the assessment, but stated this case for the opinion of the Court.

Rowlatt J. affirmed the decision of the Special Commissioners.

The Inland Revenue Commissioners appealed. The appeal was heard on November 15 and 16, 1923.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellants.

Latter K.C. and *Cyril King* for the respondent company.

The arguments sufficiently appear from the case stated and from the judgments.

The following cases were referred to : *Liverpool and London and Globe Insurance Co.* v. *Bennett* (1) ; *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (2) ; *In re Clayton's Trusts* (3) ; *Inland Revenue Commissioners* v. *Korean Syndicate* (4) ; *Birmingham Theatre Royal Estate Co.* (5) ; *Rand* v. *Alberni Land Co.* (6) ; *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (7) ; *William Esplen, Son & Swainston, Ld.* v. *Inland Revenue Commissioners* (8) ; *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (9) ; *Smiles* v. *Australasian Mortgage and Agency Co.* (10) ; *Smith* v. *Anderson* (11) ; *Muat* v. *Stewart.* (12)

Cur. adv. vult.

INLAND REVENUE COMMISSIONERS *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

At a meeting of the Commissioners for Special Purposes of the Income Tax Acts held on January 13, 1922, for the purposes of hearing appeals the South Behar Railway Company, Ld. (hereinafter called "the company"), appealed against an

(1) [1911] 2 K. B. 577 ; [1912] 2 K. B. 41 ; [1913] A. C. 610.
(2) [1920] 1 K. B. 193.
(3) Unreported. July 18, 1917. Eve J.
(4) [1920] 1 K. B. 598 ; [1921] 3 K. B. 258.
(5) Unreported. 1923.
(6) (1920) 7 Tax Cas. 629.
(7) [1891] A. C. 531.
(8) [1919] 2 K. B. 731.
(9) (1886) 2 Tax Cas. 165.
(10) (1888) 2 Tax Cas. 367.
(11) (1880) 15 Ch. D. 247.
(12) (1890) 2 Tax Cas. 601.

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assessment to corporation profits tax in the sum of 1454*l.* 16*s.* for the accounting period ending December 31, 1920, made upon it by the Inland Revenue Commissioners under the provisions of the Finance Act, 1920, Part V.

The company, which was a British company within ss. 52 and 53 of the Finance Act, 1920, was incorporated in 1895, under the Companies Acts. Its objects were to purchase and acquire the "right to enter into and to make with the Secretary of State in Council of India (hereinafter called the 'Secretary of State') . . . . the contract which has been prepared and is expressed to be made between the Secretary of State of the one part and the company of the other part . . . ." and for the other objects set out in the memorandum and articles of association.

By a deed dated August 7, 1895, made between the Secretary of State and the company it was agreed that the company should supply to the Secretary of State the funds and materials required for the construction and making fit for traffic a railway to be called the South Behar Railway; that the Secretary of State should provide free of cost to the company the land requisite for the before-mentioned purpose; that surveys, etc., should be furnished by the company to, and be subject to the approval of, the Secretary of State; that the construction of the railway would be undertaken by the Secretary of State through such agency as he should appoint, but at the entire cost and risk of the company, the funds being supplied by the company; that until the determination of the contract the Secretary of State should work and maintain the railway; that all the business connected with the management and maintenance of the railway and the conduct of the traffic, including that interchanged with the East Indian Railway, should, so far as practicable, be carried on in the same manner and subject to the same regulations and control by the Secretary of State as the like business on the East Indian Railway.

By a deed dated August 22, 1895, made between the Secretary of State and the East Indian Railway, it was agreed that the latter should construct the South Behar Railway.

By a deed dated December 11, 1906, made between the Secretary of State and the South Behar Company, supplemental to the deed of August 7, 1895, after reciting that it had been agreed that the Secretary of State might determine the contract contained in the principal deed as therein mentioned, and that on such termination the company was to give up to the Secretary of State the railway and its existing stores, and the Secretary of State was to pay to the company the sum therein indicated, and after reciting that it had been agreed between the parties that as from January 1, 1906, until the determination of the principal contract such fresh arrangement between the parties as thereinafter appeared should be substituted for the provisions of the principal contract relating to the working and maintenance of the railway, it was agreed that the Secretary of State should, as from January 1, 1906, until the determination of the principal contract, be entitled to hold and use and deal with the railway for his own benefit without any interference or control on the part of the company, and the company should accordingly relinquish the same and all stores to him; that the Secretary of State should be at liberty to work, maintain, and make alterations or additions to the railway as he might think fit, any such works which he might deem necessary to be executed free of cost to the company; the Secretary of State should be under no obligation to the company to keep the railway in working order or to work the same, and the company receiving from the Secretary of State the yearly payment thereinafter mentioned should keep him and the working agency indemnified against all claims by any one claiming to be interested in the railway through or under the company; that as from January 1, 1906, until the determination of the principal contract, the Secretary of State should pay to the company in London the yearly sum of 30,000*l.* by half-yearly payments, the company not being entitled to any charge or lien on the railway or its earnings in respect of the said yearly sum, and during the same period the company should not be required to pay interest to the Secretary of State on its indebtedness to him for advances on

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capital account, nor should the company be liable to repay the amount of that indebtedness on the determination of the principal contract; that upon the determination of the principal contract by notice of purchase the sum of 684,580*l.* should be the sum payable under the principal contract as capital expended on the undertaking with the authorization of the Secretary of State.

At the hearing before the Special Commissioners it was proved or admitted that the agreement of December 11, 1906, was still in force; that the whole work of construction and all repairs and maintenance of the South Behar Railway were effected by the East Indian Railway on behalf of the Secretary of State; that the company, since the indenture of December 11, 1906, took no part in working, inspecting or maintaining the railway, all being done by the Secretary of State and by the East Indian Railway on his behalf; the company never possessed any rolling stock in India, nor at any material time had it any agent or representative or office in India; that the company received the sum of 30,000*l.* yearly from the Secretary of State; that the shares in the company were quoted on the London Stock Exchange, there being about 200 debenture holders and about 400 shareholders in the capital stock of the company; that there were three directors of the company, the chairman receiving 200*l.* per annum and each of the other two directors receiving 150*l.* per annum; that the secretary of the company received a salary of 150*l.* per annum; and that the company had a sum of 6000*l.* invested in National War Bonds, bringing in an income of 300*l.* per annum, and in addition small sums were received from transfer fees and from money placed temporarily on deposit.

On behalf of the company it was contended: (1.) that the company had in no way constructed or maintained or used the Behar railway, and was not carrying on business as a railway company, or any business at all; (2.) that under the provisions of and since the making of the agreement of December 11, 1906, the sole rights of the company had been and were to be paid the sum of 30,000*l.* per annum

payable half yearly by the Secretary of State, or the sum of 684,580*l.*, if and when the Secretary of State determined the said agreement: (3.) that the company was not dependent upon the receipts or the existence of the Behar railway and had no interest or concern in the same; (4.) that the company was not lessor or landlord of the Behar railway; (5.) that the company did not carry on any trade or business, or any undertaking of a similar character within the meaning of the Finance Act, 1920, s. 52, sub-s. 2 (*a*); (6.) that the company did not hold investments within the meaning of the same sub-section; alternatively, (7.) that the mere holding in the circumstances stated of an investment or investments apart from the carrying on of any trade or business, or any undertaking of a similar character therein, did not impose liability to corporation profits tax under the provisions of the said section.

On behalf of the Inland Revenue Commissioners it was contended (inter alia): (1.) that the company was carrying on a trade or business; (2.) that the company was carrying on an undertaking of a character similar to a trade or business; (3.) that the company was carrying on an undertaking of a character similar to a trade or business which included the holding of investments; (4.) that the company was carrying on a trade, business or undertaking of holdings investments; and (5.) that the company was rightly assessed.

The Special Commissioners held as a fact that the company was not carrying on any trade or business or any undertaking of a similar character, and they were of opinion that the mere holding, in the circumstances above stated, of investments apart from the carrying on of any trade or business or any undertaking of a similar character did not cause liability to corporation profits tax. They accordingly discharged the assessment, but stated this case for the opinion of the Court.

Rowlatt J. affirmed the decision of the Special Commissioners.

The Inland Revenue Commissioners appealed. The appeal was heard on November 16 and 29, 1923.

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Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellants.

Hon. Sir William Finlay K.C. and *A. M. Bremner* for the respondent company.

The arguments sufficiently appear from the case stated and from the judgments.

The following cases were referred to: *Inland Revenue Commissioners* v. *Korean Syndicate* (1); *Birmingham Theatre Royal Estate Co.* (2); *Sutherland* v. *Inland Revenue Commissioners* (3); *Erichsen* v. *Last* (4); *American Thread Co.* v. *Joyce* (5); *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (6); *Mitchell* v. *Egyptian Hotels, Ld.* (7); *Grainger & Son* v. *Gough* (8); *Farmer* v. *Cotton's Trustees* (9); *Great Western Ry. Co.* v. *Bater.* (10)

Cur. adv. vult.

INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LIMITED.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 15, 1922, for the purpose of hearing appeals, the Eccentric Club, Ld. (hereinafter called "the company"), appealed against an assessment to corporation profits tax in the sum of 284*l.* 4*s.* for the accounting period ending December 31, 1920, made upon it by the Inland Revenue Commissioners under the provisions of the Finance Act, 1920, Part V.

The company was incorporated under the Companies (Consolidation) Act, 1908, on December 11, 1912.

By cl. 3 of the memorandum of association the objects for which the company was established were stated to be (inter alia): "(*a*) To promote social intercourse amongst gentlemen connected (directly or indirectly) with literature, art, music, the drama, the scientific and liberal professions, sport and commerce, and, with a view thereto, to establish,

(1) [1920] 1 K. B. 598; [1921] 3 K. B. 258.
(2) Unreported. 1923.
(3) 1918 S. C. 788.
(4) (1881) 8 Q. B. D. 414.
(5) (1913) 6 Tax Cas. 1; 163.
(6) [1920] 1 K. B. 193.
(7) [1915] A. C. 1022.
(8) [1896] A. C. 325.
(9) [1915] A. C. 922.
(10) [1922] 2 A. C. 1.

maintain and conduct a club of a non-political character for the accommodation of members of the club and their friends, and to provide a club house and other conveniences, and generally to afford to members and their friends all the usual privileges, advantages, convenience and accommodation of a club." "(*f*) To buy, prepare, make, supply, sell and deal in, or arrange for the supply of all kinds of provisions and refreshments required or used by the members of the club or other persons frequenting the club house or premises of the club."

By cl. 5: "Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding twenty shillings."

By cl. 6: "The income and property of the club shall be applied towards the promotion of the objects of the club as set forth in this memorandum of association, and no member of the club in his character as such member shall be entitled to receive, directly or indirectly, any dividend, bonus or other profit out of such income or property, but nothing herein shall prevent payments in good faith to persons in other capacities (such as servants, lenders, landlords, vendors, or in any capacity other than membership), notwithstanding their membership of the club, or the application of the property of the club upon its winding up in accordance with the company's articles of association for the time being."

By the articles of association of the company "The club" was defined as meaning "The Eccentric Club, Ld."

Art. 5: "The members of the club shall be the subscribers to the memorandum of association, and such other persons as shall apply for admission and be admitted as members."

Art. 9: "Honorary members shall not be entitled to receive notices of or to attend or vote at any general meeting of the club, or to be elected members of the committee

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or other officers of the club, or to introduce visitors or to propose or second candidates for membership, but subject and except as aforesaid, or in these articles otherwise provided :—

(*a*) All members of the club shall have the same rights, privileges and duties, and

(*b*) The term 'members' in these articles or in the memorandum of association, in reference to members of the club, shall be deemed to include all members of whatever class."

Art. 67 : "The profits of the club whencesoever derived shall be applied solely towards the benefit of the club, or otherwise in the promotion of the objects of the club as set forth in the memorandum of association, and no portion thereof shall be paid by way of dividend or bonus to members of the club."

Art. 68 : "If upon the winding up or dissolution of the club there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the club, but shall be given or transferred as the committee may determine."

The company's accounts for the year ending December 31, 1920, showed a surplus of income over expenditure of 5382*l.* 17*s.* 10*d.*, which sum was carried to the balance sheet of the same date.

At the hearing before the Special Commissioners the following facts were proved or admitted : That the company was a British company within the meaning of the Finance Act, 1920, s. 52, sub-s. 2 (*a*), and s. 52, sub-s. 3 (1) ; that the club was purely a members' club and not a proprietary

(1) Finance Act, 1920, s. 52, sub-s. 3 : "In this Part of this Act—

"The expression 'company' means any body corporate so constituted that the liability of its members is limited, but does not include a company formed before the commencement of this Act whose assets consist wholly of stock or other securities issued by any public authority and formerly held by the persons by whom the company was formed :

"The expression 'British company' means any company incorporated by or under the laws of the United Kingdom :

"The expression 'foreign company' means any company which is not a British company. . . . . "

club; that if the amount of the members' subscriptions and entrance fees during the year ending December 31, 1920, totalling 11,442*l.* 7*s.*, was eliminated, instead of there being a surplus of income over expenditure, there would have been a deficit, and no liability to corporation profits tax would have existed; that the company was not, and never had been, assessed to income tax in respect of any profits or surplus; that there were no receipts from anything in the nature of trade from persons other than members.

It was admitted that to involve liability to corporation profits tax the company must be brought within the provisions of s. 53, sub-s. 2 (*h*), of the Finance Act, 1920, as read in conjunction with s. 52, sub-s. 2, of the same Act.

The sole question for the determination of the Court was whether the company was liable to corporation profits tax on the sum of 5684*l.* or any sum.

On behalf of the company it was contended: (1.) that what the company was formed for, and did, was not the carrying on of any trade or business or any undertaking of a similar character within sub-s. 2 of s. 52 of the Finance Act, 1920, and that, therefore, the company was not within the charging section (s. 52) at all; (2.) that even if the carrying out of the objects for which the company was formed might in certain circumstances amount to the carrying on of a trade or business or undertaking of a similar character within sub-s. 2 of s. 52 of the Finance Act, 1920, the constitution of the company in this case was such as to preclude the carrying on of any trade or business or undertaking of a similar character within the meaning of the sub-section; (3.) that s. 53 of the Finance Act, 1920 (1), was a

(1) Finance Act, 1920, s. 53, sub-s. 1: "For the purpose of this Part of this Act, profits shall be taken to be the actual profits arising in the accounting period, and shall not be computed, by reference to the income tax year or on the average of any years."

Sub-s. 2: "Subject to the provisions of this Act, profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Schedule D set out in the First Schedule to the Income Tax Act, 1918, as amended by any subsequent enactment, whether the profits are assessable to income tax under that Schedule or not:

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"machinery" section, that its provisions did not extend the scope of the charge which was laid on by s. 52, and that if the company was not within the charge laid on by s. 52 liability to the tax could not be imposed upon it by virtue of s. 53 or any part of it; (4.) that the company was not a mutual trading concern within the meaning of para. (*h*) (1.) of the proviso to sub-s. 2 of s. 53 of the Finance Act, 1920; (5.) that the company was not liable to corporation profits tax at all; and (6.) that if the company were so liable then the amounts received by the company by way of subscriptions and entrance fees should be eliminated from the computation of its liability.

On behalf of the Inland Revenue Commissioners it was contended (inter alia) (*a*) that the company was carrying on a trade or business or undertaking of a similar character within the meaning of the Finance Act, 1920, s. 52, and (*b*) that the assessment appealed against was rightly made and should be confirmed.

The Special Commissioners differed in opinion, one thinking that the company did not come within either s. 52, sub-s. 2, or s. 53, sub-s. 2 (*h*), of the Act, and was therefore not liable to the tax, while the other thought the company was a mutual trading concern within s. 53, sub-s. 2 (*h*), and was liable at any rate on the surplus arising from the provision of meals, bedrooms, etc.; but in accordance with the practice of the Commissioners of deciding in favour of the taxpayer where the Commissioners came to opposite conclusions, the second Commissioner withdrew his opinion, and the assessment was discharged, whereupon this case was stated for the opinion of the Court, the sole question being whether the company was liable to corporation profits tax on the sum of 5684*l.* or any sum.

"Provided that, for the purpose of this Part of this Act . . . . (*h*) profits shall include in the case of mutual trading concerns the surplus arising from transactions with members, and in the case of a society registered under the Industrial and Provident Societies Act, 1893, any sums paid by way of bonus, discount, or dividend on purchases, shall be treated as trade expenses, and a deduction shall accordingly be allowed in respect thereof."

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Rowlatt J. held that the company was carrying on an "undertaking of a similar character" to that of a trade or business, and was therefore liable to corporation profits tax.

The company appealed. The appeal was heard on November 29, 30 and December 1, 1923.

Konstam K.C., *A. M. Bremner* and *R. W. Needham* for the appellant company.

R. P. Hills (*Sir Thomas Inskip S.-G.* with him) for the Inland Revenue Commissioners.

The arguments sufficiently appear from the case stated and from the judgments.

The following cases were referred to: *New York Life Insurance Co.* v. *Styles* (1); *Gresham Life Assurance Society* v. *Styles* (2); *Last* v. *London Assurance Corporation* (3); *Gresham Life Assurance Society* v. *Bishop* (4); *Inland Revenue Commissioners* v. *Korean Syndicate* (5); *Religious Tract and Book Society of Scotland* v. *Forbes* (6); *Grove* v. *Young Men's Christian Association* (7); *Carlisle and Silloth Golf Club* v. *Smith* (8); *In re Incorporated Council of Law Reporting for England and Wales* (9); *Mersey Docks and Harbour Board* v. *Lucas* (10); *Paddington Burial Board* v. *Inland Revenue Commissioners* (11); *Port of London Authority* v. *Inland Revenue Commissioners.* (12)

Cur. adv. vult.

Dec. 17. The following written judgments were delivered:—

POLLOCK M.R. These three cases depend upon the right construction to be placed upon the relevant portions of ss. 52 and 53 of the Finance Act, 1920. By s. 52 there is

(1) (1889) 14 App. Cas. 381.
(2) [1892] A. C. 309.
(3) (1885) 10 App. Cas. 438.
(4) [1901] 1 Q. B. 153.
(5) [1920] 1 K. B. 598; [1921] 3 K. B. 258.
(6) (1896) 3 Tax Cas. 415.
(7) (1903) 4 Tax Cas. 613.
(8) [1912] 2 K. B. 177; [1913] 3 K. B. 75.
(9) (1888) 22 Q. B. D. 279; 3 Tax Cas. 105.
(10) (1883) 8 App. Cas. 891.
(11) (1884) 13 Q. B. D. 9.
(12) [1920] 2 K. B. 612.

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charged the tax, called the corporation profits tax, upon all profits to which Part V. of the Act applies and which arise in the accounting period. By sub-s. 2 (*a*) the profits, to which Part V. of the Act applies, are determined to be "the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." In that sub-section there is a proviso which eliminates for a limited period the profits of certain companies which may broadly be described as public utility undertakings, and which are precluded by statute from charging increased prices or distributing higher rates of dividend than those specifically authorized by the Acts regulating their powers. There is a further exception—under sub-s. 3—of certain other companies. The effect, therefore, of s. 52, according to the structure of the Act, appears to be this—that prima facie sub-s. 2 (*a*) is a wide, embracing section, at first sight operative to include all British companies carrying on trade or business or any undertaking of a similar character, from which it was necessary to exclude certain companies and undertakings which would otherwise be embraced in its terms.

Some light perhaps may also be thrown upon the inclusive nature of the section by s. 43 of the Finance Act, 1922, whereby the profits of charitable and other companies registered without the word "limited" are expressly exempted from the corporation profits tax. This statutory exception appears to have been necessary because, without it, the words which I have referred to in s. 52, sub-s. 2 (*a*), would prima facie have included the companies expressly excluded by s. 43. Sub-s. 2 (*a*) is undoubtedly difficult to construe. The words "trade or business" are very wide words. In the Income Tax Act, 1918, the word "trade" is used without the word "business." In the present section both the words "trade" and "business" appear, and it is not easy to appreciate what undertaking there could be similar in character to a trade or business which is not embraced within the two words "trade" or "business." In the Act which imposes the excess profits

duty, the Finance (No. 2) Act, 1915, by s. 39, the trades or businesses to which the part of the Act imposing excess profits duty applies are "all trades and businesses (whether continuously carried on or not) of any description carried on in the United Kingdom," and then follow certain exceptions.

It is not possible to form any accurate measure of construction to be put on the words in sub-s. 2 (*a*) by reference to, or analogy from, the Income Tax Acts, or the Excess Profits Duty Act; the words must be taken as they stand. They impose the tax upon the profits first of all of a British company carrying on any trade or business, and these latter words are, in my opinion, used in an adjectival sense. There may be a British company which is not carrying on a trade or business. Thus, unless it can be said to be carrying on an undertaking of a similar character, whatever those words may hereafter be held to mean, the company's profits are not subject to tax if it is not carrying on a trade or business. It is not, in my judgment, possible, nor is it necessary for the purpose of the decision of the three present cases, to give a final definition of what companies are within or without sub-s. 2 (*a*). It is enough that a British company is prima facie included, provided that it carries on a trade or business. It is admitted that in the three cases now before us the companies whose profits the Crown seeks to tax are British companies. The question to be determined is whether they are carrying on a trade or business, for those are the words relied upon by the Solicitor-General as embracing the three cases before us.

A number of cases have been referred to for guidance. In *Liverpool and London and Globe Insurance Co.* v. *Bennett* (1), it was held by Hamilton J. (now Lord Sumner) that an insurance company, which had investments abroad, particularly for the purpose of fulfilling a condition of permission to carry on business in a foreign country, must pay income tax in respect of the interest received on the investments abroad, whether made to comply with the foreign law, or voluntarily,

(1) [1911] 2 K. B. 577.

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to accumulate a reserve in the foreign country, on the ground that the interest on both classes of investments was a part of the profits or gains accruing to the business from the trade it carried on. The interest received was received in the course of carrying on the business of the company. The sums representing that interest, whether remitted to this country or not, would form a part of the assets in the balance sheet of the company, and so be subject to tax.

In *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (1) it was held that a company, the liquidation of which was stayed for the purpose of receiving royalties, which were found to be in effect payment by instalments of part of the price of the property which the company had definitely disposed of to a new company, was not carrying on business. The liquidation of the old company was only stayed in order that it might receive from the new company the price to be paid by the new company for the property handed over to the latter, and although the payment was made by instalments instead of by a lump sum, Rowlatt J. held that the company receiving these royalties as a payment was not carrying on business and was not liable for excess profits duty.

The third case is that of *Inland Revenue Commissioners* v. *Korean Syndicate.* (2) In that case the company had dealt with certain concessions belonging to it, and had secured royalties to be paid to it by the lessees under a lease of the concession granted by it. Rowlatt J. held that the company was not carrying on business within s. 39 of the Finance (No. 2) Act, 1915. This decision was reversed by the Court of Appeal. (3) That Court held that the operation carried out by the company was a turning to account of the concession within the memorandum of association of the company, and was, therefore, part of the legitimate business carried on by it. Lord Sterndale M.R. calls attention to the importance of seeing what the purpose of the company was as expressed in its memorandum of association, and had regard to that

(1) [1920] 1 K. B. 193. (2) [1920] 1 K. B. 598.
(3) [1921] 3 K. B. 258.

purpose as a factor for consideration when a decision had to be made in the particular circumstances before him on the question whether the company was carrying on business or not. It may be well to remark, in this connection, that although I agree with Rowlatt J.'s observation in the present case that every British company which is fulfilling the objects of its memorandum of association is not thereby ipso facto, and of necessity, brought within s. 52, sub-s. 2 (*a*), of the Act of 1920, yet if its objects are business objects and are in fact carried out, it follows that the company carries on business, and consequently comes within the sub-section. Atkin L.J. in the *Korean Syndicate Case* (1) expressly holds that the interpretation of the word "business" given by Rowlatt J. in *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (2), if intended to be a precise definition, would be too narrow. The judge had said that the meaning of "business" was an active occupation or profession continuously carried on, and Atkin L.J. pointed out that if any emphasis is to be attached to the word "active" he would not agree with it. Whether Rowlatt J. did so intend may be open to doubt, for in the *Korean Syndicate Case* (3), when before him, he makes a reservation with which I agree. "It does not follow," he says, "that, whenever at some particular moment a company is doing nothing but receiving an income from its investments, it is not carrying on a business"; and he indicates that in a certain class of cases, although a company is not actively doing anything, the right conclusion would be that the company was nevertheless carrying on a business.

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Coming now to the particular cases which are before us, the first is that of the *Westleigh Estates Co., Ld.*, in which the Commissioners held that the company was holding investments, but inasmuch as it was not carrying on business, in their view, the holding of investments did not bring the

(1) [1921] 3 K. B. 258, 276. (2) [1920] 1 K. B. 193, 203.
(3) [1920] 1 K. B. 598, 603.

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company within the range of the Act. The company, however, appears to have power to exchange any of its investments and to deal with the moneys of the company as may be from time to time required. They have, as stated in para. 6, sub-cl. (*c*), of the case stated, on two occasions altered their investments; and in the note attached to the accounts of the company for the year ending June 30, 1920, the last account attached to the case, there is a statement: "Your directors would draw the attention of the shareholders to the important fact that the property is to a large extent a wasting asset, and leave it in their hands to say whether the balance was to be all divided as dividend, or dividend and bonus, or whether any part should be set aside and invested by way of sinking fund."

It is a clear rule that the questions of fact are to be found by the Commissioners, and that their decision cannot be upset if they have rightly applied the law to the facts found by them. It is an equally clear rule that the law must be interpreted by the Courts before which the case stated comes. In my judgment the Commissioners have not applied the true rule of law to the facts found. It is impossible to say that the Westleigh Estates Company had ceased to do any business. One of the facts found (see para. 6 (*e*) of the case) is as follows: "The minerals under the surface of the property have been worked by the various lessees under leases which had, and still have, many years to run. On expiration these leases have been renewed, or fresh leases granted, to the same lessees. The company has never itself worked any of the mines under the property." As and when, therefore, occasion arises, further leases may and will be granted by the company. It was in my judgment exactly in that state referred to by Rowlatt J. in the *Korean Syndicate Case*. (1) Its business may have been quiescent, but it was still carrying it on, and I think that it falls within the words "a British company carrying on a trade or business" without the necessity of having reference to the words "including the holding of investments." Those words appear, in my

(1) [1920] 1 K. B. 598, 603.

judgment, to sweep into the category of companies whose profits are subject to tax, a company which is formed for the purpose of holding the shares of another company and divide the dividends received as may be determined from time to time, and, it may be, other companies as well.

In this case, however, it is not necessary to invoke their aid. The Westleigh Estates Company was, in my judgment, carrying on a trade or business, and, therefore, I am of opinion that the appeal should be allowed, with costs here and below.

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The original purpose of this company was to supply to the Secretary of State for India the funds and material required for the construction, completion, and making ready and fit for public traffic a railway to be called the South Behar Railway. The railway was in fact constructed by the East Indian Railway Company, as agents for the Secretary of State.

By the indenture dated December 11, 1906, supplemental to the indenture of August 7, 1895, the railway, by that time constructed, was to be held by the Secretary of State "for his own benefit, without any interference or control on the part of the company, and the company was accordingly to relinquish the same to him, together with all stores now belonging or appropriated to the railway." By cl. 5 of this indenture, as from January 1, 1906, until the determination of the principal contract of August 7, 1895, it is provided that the Secretary of State shall pay to the company in London the yearly sum of 30,000*l.* by half yearly payments on every June 30 and December 31 in each year. A number of the clauses contained in the principal contract were determined, but in particular cl. 27 remains in force. It is as follows: "In the event of an agreement being entered into between the Secretary of State and the company for the construction of any branch of the Behar Railway, the company, subject to the terms of such agreement, shall either construct

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the same, or provide the funds or material in lieu thereof, required for the construction and completion of the same by an agency to be approved by the Secretary of State." The case states that the shares of the company are quoted on the London Stock Exchange, though the company's stocks do not frequently change hands. There are about 200 debenture holders and about 400 shareholders of the capital stock of the company. There are three directors of the company: the chairman receiving 200*l.* per annum, the other two directors 150*l.* per annum as remuneration, and the secretary receives a salary of 150*l.* per annum. The company has a sum of 6000*l.* invested in National War Bonds, bringing in an income of 300*l.* per annum. In addition smaller sums are received from fees, paid on the transfer of stock, and their money placed temporarily on deposit. The Secretary of State has power to take over the railway on payment to the company of a sum of 684,580*l.*, which is the sum determined to be payable under cl. 56 of the principal contract, as capital expended on the undertaking, and upon this purchase the principal contract will become determined.

It is agreed that the company is a British company. Immunity from liability to corporation profits tax is claimed by the company on the ground that it is not carrying on any trade or business. In my judgment it is impossible to say that the company is not carrying on any trade or business. It could not be wound up on the ground that its objects had been attained and completed. It is, in my opinion, in the same state that I have already referred to in the previous case. Its business may be quiescent, and, to a large extent, a matter of routine. Its receipts may be derived, if not wholly, at least almost entirely from the annual payments made to it by the Secretary of State; but it remains a company alive, and still requiring, if only in smaller details, the direction of its directors and the duties carried out by its secretary. It is still concerned in the business of disposing of and dividing the profits which it has become entitled to by reason of its greater activity in the past, and that

activity, as well as possibly others, may be awakened and quickened in the future. For these reasons I am of opinion that the appeal must be allowed, with costs here and below.

INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LIMITED.

The next case, that of the Eccentric Club, Ld., involves different considerations. It is admitted that the company is a British company. The two Commissioners who heard the case were divided in their opinion. Rowlatt J. has held that it is carrying on business. The limited company was formed for the purpose of carrying on the Eccentric Club. [His Lordship read clauses 3 (*a*) and 6 of the memorandum of association and continued :] The members of the club are to be the subscribers to the memorandum of association, and such other persons as shall apply for admission, and be admitted as members. Each person who proposes to be a member of the club signs an application by which he affirms : "I desire to become a member of the Eccentric Club, and I agree, if elected, to become a member, and to be bound by the memorandum and articles of association and bye-laws of the club." The election of members is vested solely in the committee, and is to be by ballot. An applicant cannot become a member of the company unless he has first of all been chosen to be a member of the club. But if and when he is elected to be a member of the club, he is required to become a member of the company. The business of the company is to carry on the club, and any profits must be devoted, in accordance with the memorandum of association, to the advancement of the objects of the club. It is argued on behalf of the Crown that the company is carrying on the business of the club : while the contention on behalf of the club is that although in form it is a company, it does not carry on any trade or business in any just appreciation of those terms, that its object is not business, but to promote social intercourse, and that the club and the company do not seek to gain, nor do their activities result in profits.

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The two cases of *Last* v. *London Assurance Corporation* (1) and *New York Life Insurance Co.* v. *Styles* (2) were cited and relied upon respectively on either side. It is a well recognized principle that, in revenue cases, regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be discarded. In the *New York Life Insurance Co.'s Case* (2) the majority of the House of Lords held that in substance the surplus of the premiums contributed by the members was the result of the mutual insurance between members only, and that although the members were united in a corporation, in truth and in fact the case could be regarded as if they were an unincorporated association of individuals. Lord Herschell (3) asks: "Can it be said that the persons who are thus associated together for the purpose of mutual insurance, carry on a trade or vocation from which profits or gains accrue to them?" And he answers: "I cannot think so." Lord Macnaghten says (4): "It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated company. But the company (so far as regards the participating policy-holders) was not formed for the purpose of carrying on a business having for its object the acquisition of gain. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company, was properly treated as immaterial. And yet I cannot help thinking that the difficulty in the case, such as it is, has been caused by the existence of the company. Put the company out of sight altogether, and what remains? Certain persons agree to insure their lives among themselves, on the principle of mutual insurance."

Although the *New York Life Insurance Co.'s Case* (2) was decided upon the Income Tax Acts, and could not be invoked as governing the present, the reasoning in it may be used

(1) 10 App. Cas. 438.
(2) 14 App. Cas. 381.
(3) 14 App. Cas. 409.
(4) Ibid. 411.

when, as in the present case, one has to decide whether the form of the Eccentric Club alone is to be looked at, or whether one may test the question whether the company is carrying on business, by looking at the nature and purpose and substance of the transaction by which the members of the club are aggregated in the company. It seems a somewhat far-fetched interpretation of the relevant section of the Act to hold that the association and activities of the members of the club connote the carrying on of business. In my judgment the company was the structure only; it did not carry on a trade or business in the sense intended by s. 52, sub-s. 2 (*a*), so as to impose a liability to corporation profits tax. The facts of this case are special and peculiar, and while as a general rule in cases of a company registered with the appendix "Limited" there would be a strong presumption that it was intended to, and did carry on a trade or business, yet, in my judgment, that presumption can be rebutted, and is so, where the facts are such, as in this case, as to negative both the aim and the prospect of gain. The appeal in this case also will be allowed, with costs here and below.

WARRINGTON L.J. Before dealing with the separate cases I should like to make a few general observations on the construction of s. 52. In the first place the tax is one upon profits, and the object of sub-s. 2 is to define the profits to which the section applies. They are the profits of a British company bearing a certain character. This character is described by the words "carrying on any trade or business," etc. These words seem to me intended, on the one hand, to exclude companies, whether limited by shares or guarantee, and whether the word "limited" is omitted from their names or not, which are formed for purposes other than commercial purposes, such, for example, as philanthropic or religious purposes, and which in substance confine their activities to the purposes for which they are formed. On the other hand, the words are made wide enough to include companies which, though

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bearing the characteristic of commerciality, might conceivably be regarded as not carrying on a trade or business in a strict interpretation of those words, and particularly companies not directly carrying on business but holding investments in the securities of other concerns which do so, and from which the company in question derives profits. Following out the same idea, s. 53, sub-s. 2 (*a*), contains a very wide definition of profits ending with the words "other income arising from investments or any other source." The Commissioners in each case found in favour of the subject and discharged the assessment; on the two first they described the conclusion at which they arrived as a finding of fact, and it has been contended that as such it is not open to review by the Court. In my opinion, this contention is not well founded. The findings of fact in the proper sense are those stated in the body of the case. The decision involves the true construction of the section having regard to those facts, and is therefore a conclusion of law or mixed law and fact, and as such is open to review.

I will now deal with the cases separately.

INLAND REVENUE COMMISSIONERS *v.* WESTLEIGH ESTATES COMPANY, LIMITED.

The question is whether the Commissioners and the learned judge were right in the conclusion at which they respectively arrived, that the company was not carrying on any trade or business or any undertaking of a similar character. The company is admittedly a British company. Amongst the objects of the company as set forth in the memorandum of association are those mentioned in para. 3 of the special case, and it is unnecessary to repeat here the description of them. Perhaps the most important is the general one which, in the special case, is lettered (*e*), but in the original is (*p*), and is as follows: "To sell, improve, repair, manage, develop, exchange, lease, mortgage, farm or work as market gardens, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company." In my opinion the doing of any of the things so described would

certainly be the carrying on of a business. In fact the company has acquired the property, the acquisition of which was its immediate object, and has not acquired any other. The land is coal-bearing land, and the bulk of it is in lease to various lessees who pay the company rents and royalties. Some of the leases have fallen in and have been renewed by the company, in each case to the same lessees, a fact mentioned by the Commissioners, but in my opinion immaterial. There are also surface leases from which rents are derived. Two small portions of land have been sold and the proceeds have been invested. I think the facts found by the Commissioners result in this: the company was formed with certain objects. They have done various things in pursuit of one or other of those objects, and they have thereby derived profits. I have already said that in my opinion the description of the objects is the description of a trade or business. It follows that, in my judgment, the company have been and are carrying on a trade or business.

A number of cases have been referred to, but in my opinion there is nothing in any of them which would lead to a conclusion different from that at which I have arrived. It was contended indeed that the company was merely in the position of an ordinary landowner dealing with his land and granting leases thereof and so receiving rents and profits. But assuming that in the case of an individual to do such things would not be to carry on a trade or business, it does not at all follow that the conclusion would be the same in the case of a company the end and object of whose being is to transact the business in question and thereby to make a profit for division amongst its shareholders: see the remarks of Lord Sterndale M.R. in *Inland Revenue Commissioners* v. *Korean Syndicate*. (1) It seems to me also quite immaterial that the actual operations of the company have been few in number and perhaps of no great importance. If you find a company formed to carry on a business, and in fact carrying it on, it cannot matter that its activities have been restricted. The learned judge seems to ground his decision largely on

(1) [1921] 3 K. B. 258, 273.

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the notion that the company "did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries." With all respect, this at all events is a false analogy. The company is not a trustee in any sense; it is doing on its own account and for its own profit the several things authorized by its memorandum. In this connection I may mention an obvious error of the Commissioners in point of fact. They say in para. 6 (*f*): "The shares in the company can only be transferred among the existing shareholders and their families." In truth the articles give to members and certain other persons a right of pre-emption only; failing the exercise of this right the shares may be sold to any one and at any price.

In my judgment the learned judge has arrived at the wrong conclusion, and his order should be reversed and an order made expressing the opinion of the Court that the decision of the Commissioners for Special Purposes of the Income Tax Acts was incorrect and that the assessment appealed against ought to stand. The Commissioners of Inland Revenue ought to have their costs here and below.

INLAND REVENUE COMMISSIONERS *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

This case raises the same question, but under slightly different circumstances. The company here was undoubtedly at one time carrying on a business, but it is said that it ceased to do so in 1906, and that it was not at any material time a "company carrying on a trade or business" and so forth.

The company was incorporated in the year 1895 with the primary object of entering into and carrying into effect an agreement with the Secretary of State for India for the financing by the company of the construction and equipment of the South Behar Railway, which was to be constructed, worked and maintained by the Secretary of State through the agency as afterwards arranged of the East Indian Railway Company. The memorandum, however, contained wide powers going beyond the carrying into effect of the particular

agreement. It was provided by the agreement that the gross earnings of the railway were to be divided between the Secretary of State and the company in certain proportions, and the proportion allotted to the company was to be the net earnings of the company and dealt with accordingly. Provision was also made for the determination of the contract by notice to be given by the Secretary of State, and in that event for the purchase of the railway works and so forth at their fair value. The rolling stock and working plant was to be provided by the Secretary of State. The railway was duly constructed by the East Indian Railway Company as the agents of the Secretary of State, the money therefor being supplied by the South Behar Company. It was worked by the East Indian Railway Company as the agents of the Secretary of State. In 1906 a further agreement was made between the Secretary of State and the company. By this agreement it was provided that from January 1, 1906, until the termination of the original agreement the Secretary of State might hold, use, and deal with the railway for his own benefit without any interference or control on the part of the company and should be at liberty to work and maintain the railway in such manner as he should think fit, but without being under any obligation to the company in reference thereto. He was to pay to the company the yearly sum of 30,000*l.*, and the payments provided for in the original agreement were to cease to be payable. The sum to be paid as the fair value of the railway works and so forth on the termination of the original contract was fixed at 684,580*l.*

No notice of termination has been given.

Since the agreement of 1906 the company has taken no part in working, inspecting or maintaining the railway. It has no office or representative in India. The 30,000*l.* is paid by equal half-yearly payments, and is brought into the half-yearly accounts of the company as revenue. The company also derives revenue from a sum of 6000*l.* War Bonds held by them. The company has three directors and a secretary, and presents to its shareholders regular reports

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and accounts every half-year when ordinary general meetings are held for declaring dividends and transacting the ordinary business of the company, including the declaration of dividends and the election of officers.

The company, having been assessed to corporation profits tax on their profits, appealed to the Special Commissioners, who discharged the assessment, holding as a fact, as in the previous case, that the company was not carrying on a trade or business or any undertaking of a similar character, and being of opinion that the holding of the investment above referred to did not of itself cause liability to corporation profits tax. They then, at the request of the Inland Revenue Commissioners, stated a case for the opinion of the Court, the question being whether the company was under the circumstances liable to be assessed to corporation profits tax. It is said that the company is not now, and has not since 1906, been carrying on any business. With all respect, I cannot concur in that view. Referring to the opinion already expressed as to the true construction of the section, the source of income from which the profits are derived has its origin in and could not have existed but for the business which the company was formed to carry on and did in fact carry on. The company bears the character required by the section—namely, that of a company carrying on a business, and it has not, in my opinion, lost that character because the particular venture in which it engaged has been finished, except that the company receives revenue therefrom and may hereafter receive repayment of capital. I prefer to base my judgment on this broad view, but if this is incorrect I should be prepared to hold that it has never ceased to carry on the business for which it was established. It is part of its business to declare dividends and pay them to its shareholders, to elect officers and transact the other business of its general meetings. There remains also the duty of dealing with the 684,580*l.* if and when received, whether it be by returning their capital to the shareholders through the process of winding-up or by embarking it in new financial transactions within the memorandum of association.

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On the whole I think the view of the Special Commissioners and Rowlatt J. is incorrect, and this appeal ought to be allowed, and the question put to the Court in para. 9 of the special case answered in the affirmative.

INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LIMITED.

In this case the company was incorporated as a company limited by guarantee. Its main object as described in the memorandum of association was: [His Lordship read clause 3 (*a*) and (*f*) and clause 6 and continued:] The company was formed to take over the assets and liabilities of and to continue the working of an existing members' club. The members of the company are all members of the club, and every member of the club on election becomes ipso facto a member of the company, and, therefore, a guarantor of the appointed contribution in the event of winding up whilst he continues a member or within a year from his ceasing to be one. As is usual in clubs of this nature, no payments for provisions supplied in the club are taken from any person not a member.

The learned judge has held that the company is carrying on an undertaking similar to the trade or business of a club proprietor. With all respect, I should have thought that if its profits could be charged with the tax at all it would be because the company, regarded, as in law it is, as a separate entity or persona, is carrying on the actual trade or business of a club proprietor. But can this properly be said of it? The club proprietor, whether an individual or a company, carries on a business with a view to profit as an ordinary commercial concern. This the present company certainly does not do. I think the proper mode of regarding the company in the present case is as a convenient instrument for enabling the members to conduct a social club, the objects of which are immune from every taint of commerciality, the transactions of sale and purchase being merely incidental to the attainment of the main object. What is in fact being carried on, putting technicalities aside, is

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a members' club and not a proprietary club, nor any undertaking of a similar character. That in such a case one may go behind technicalities and look at the substance is, I think, shown by the mode in which the House of Lords dealt with a question, similar in this respect, in *New York Life Insurance Co.* v. *Styles.* (1) That transactions of sale and purchase may be merely incidental to non-commercial objects and not regarded as in themselves a trade is, in my opinion, shown by the contrast recognized by the Court in *Religious Tract and Book Society of Scotland* v. *Forbes* (2), between the book-selling business which was held to be a trade, and the colportage which was held not to be of that character; and in *Grove* v. *Young Men's Christian Association* (3) between the public restaurant and the educational and religious undertaking, although the latter involved the taking of fees from members attending classes, and so forth.

On the whole I am of opinion that the appeal of the company in this case succeeds, and that the order of Rowlatt J. should be set aside, and the assessment discharged with costs here and below.

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SARGANT L.J. In this case Rowlatt J. has found as a conclusion of fact that "this limited company came into existence not with any notion of trade or business but merely as a convenient form under which the duties and powers of an executor could be exercised," (4) and also that "the family company did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries," (5) and his conclusions of law are based upon this view of the facts. In my judgment, the learned judge in so finding the facts has not fully appreciated the results of the agreement of August 20, 1900, which appear to

(1) 14 App. Cas. 381.
(2) 3 Tax Cas. 415.
(3) 4 Tax Cas. 613.
(4) [1923] 2 K. B. 514, 528.
(5) Ibid. 527.

me to be much more important and far-reaching than he has supposed.

If under the agreement the company had merely been put in the position of an executor and trustee, its operations would necessarily be limited in point of time, and would result within some reasonable period in the realization of the estates and the distribution of the proceeds, or possibly, as to the whole or part of the estates in the allocation or appropriation to and amongst the beneficiaries of aliquot portions thereof; and further the company would be in a fiduciary position and accountable to the beneficiaries in that capacity. But in fact the position is an entirely different one. The company has become the absolute legal and beneficial owner of the estates, and no relation of trustee and cestui que trust exists between it and the beneficiaries. They are relegated to the ordinary position and rights of shareholders in an ordinary limited company, and have no further or other interest in the properties which formerly belonged to them in fractional shares; and there is no time limit whatever to the activities of the company, which may very well endure and carry on the leasing and management of the estates for a century or more.

I am altogether unable to distinguish the case from the ordinary case of the out and out sale of a mining or urban estate to a company which is thereafter to manage, improve and develop it, and to distribute the profits to arise therefrom amongst its shareholders in the ordinary way. Companies of this kind are, of course, quite common, and their operations in my view involve the carrying on of a trade or business, or at least of an enterprise of a commercial character such as to be aptly described as "an undertaking of a similar character." The mere fact that the formation of the company and the exchange of the vendors' fractional interests for corresponding amounts of share capital were rendered desirable by the difficulty of otherwise dealing with the estates is, in my view, immaterial; as is also the fact that the shares cannot be freely dealt with in the open market unless there has been a failure to exercise for one month

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certain special rights of pre-emption. Neither of these circumstances affects the existing position of the company as one formed for the purpose of dealing with land so as to return profits to its shareholders, and actually engaged in carrying out the business or enterprise in question. The decision here of Rowlatt J. seems somewhat inconsistent with his previous decision a few days earlier in the case of the *Birmingham Theatre Royal Estate Co.* (1)

It is also clear that the finding in the case stated that the company are not carrying on any trade or business or any undertaking of a similar character is not a mere finding of fact, but is at least a finding of mixed law and fact.

In my opinion, therefore, this appeal should be allowed.

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On August 7, 1895, this company, in pursuance of its memorandum, entered into an indenture (hereinafter called the principal contract) with the Secretary of State in Council of India for the provision of funds and materials for the construction and equipment of a railway called the Behar Railway. The railway when constructed was to be worked, managed and (except for the first two years) maintained by the Secretary of State through such agency as he might choose (the selected agents being in fact the East Indian Railway Company), and the remuneration of the company was to consist in the receipt as their net earnings after the first two years of 55 per cent. of the gross earnings of the railway. The principal contract contained a clause 54 (2.), under which the Secretary might, by giving not less than twelve months' previous notice of purchase, determine the contract on June 30, 1919, or on June 30 in the last year of any subsequent period of ten years, and on the expiration of such notice of purchase the company had to relinquish to the Secretary of State all claim whatsoever to the Behar Railway or the equipment thereof, and the Secretary of State within four months of the determination of the principal

(1) Unreported. 1923.

contract was to pay to the company in England such a sum as when added to the unspent capital of the company should amount to the total paid-up capital of the company so far as such capital other than unspent capital had been expended on the railway with the authorization of the Secretary of State.

By another indenture (hereinafter called the supplemental contract) dated December 11, 1906, and made between the Secretary of State in Council of India of the one part and the company of the other part, after recitals which showed that the railway had been constructed in accordance with the principal contract and had been worked down to January 1, 1906, by the East Indian Railway Company on behalf of the Secretary of State, and that the capital stock of the company amounting to 379,580*l.* and the proceeds amounting to 305,000*l.* of an issue of 290,000*l.* debenture stock, making together a total sum of 684,580*l.* of capital, had been expended by the company with the authorization of the Secretary of State on the undertaking of the company, and after reciting that the parties had agreed that as from January 1, 1906, until the determination of the principal contract such fresh arrangement as thereinafter appeared should be substituted for the provisions of the principal contract relating to the working and maintenance of the railway, and otherwise as thereinafter mentioned, it was amongst other things agreed and declared to the effect following, that is to say, cl. 2, the Secretary of State was as from January 1, 1906, to deal with the railway for his own benefit without any interference or control by the company, and accordingly the company should relinquish the same to him together with any stores belonging or appropriated to the railway. (Clause 3) the Secretary of State should during the period aforesaid be at liberty to work, maintain and improve the railway by any working agency and in any manner he should think fit. (Clause 4) the Secretary of State should be under no obligation to the company to keep the railway in working order or to work the same or to execute any works in relation thereto, and the company receiving from the Secretary of State the

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yearly payment therein mentioned should at all times keep him and the working agency indemnified against all claims in respect of the debenture stock or any other incumbrances of the railway through or under the company. (Clause 5) as from January 1, 1906, until the determination of the principal contract the Secretary of State should pay the company the yearly sum of 30,000*l.* as therein mentioned, and the company should not be entitled to any charge, lien or security on the railway or the earnings thereof in respect of the said yearly sum; and (clause 6) on the determination of the principal contract by notice of purchase the said sum of 684,580*l.* should be the sum payable under the principal contract as capital expended on the undertaking with the authorization of the Secretary of State.

I have summarized these two contracts because of the extreme importance I attach to the change effected by the supplemental contract in the position of the company.

The net result of that contract, as applied to the principal contract, is plain. It is that as from January 1, 1906, the company made an out and out sale of the railway to the Secretary of State and ceased to have any interest therein whatever. The sale was not the less an out and out sale because the consideration was not a lump sum, but was a perpetual annuity commutable into a lump sum at any one of certain intervals at the option of the Secretary of State. As from the signing of the supplemental agreement the company lost all right and interest to or in the business and undertaking of the railway, and became simply and solely the recipients of a perpetual personal annuity redeemable by a capital payment.

The only reason for the continued existence of the company as a corporation appears to be to enable the 30,000*l.* annuity to be received and (after payment of or provisions for income tax) distributed by way of interest to the holders of debenture stock and by way of dividend to the shareholders. The receipts of the company from this annuity, from dividends and interest on certain small sums of capital thereinafter mentioned, and from transfer fees amount to an annual sum

slightly exceeding the total of the interest on the company's debenture stock and a dividend of 5 per cent. on its issued capital, and accordingly there appear on the company's balance sheet certain small capital items which would seem to be the result of the accumulation of this excess, or of some balance of revenue before January 1, 1906, or of both; and the most important of these items is a sum of 6000*l.* National War Bonds 1922 which in all probability is the result of a purchase made during the war in response to the appeal issued by the Government at that time. But these capital items are mere balancing items of small importance, and the holding of them cannot in my view amount to a "carrying on of a trade or business" by way of "holding investments" within the later words of sub-s. 2 of s. 52 of the Finance Act, 1920, if the company are not otherwise within the words of sub-s. 2 as "carrying on a trade or business, or any undertaking of a similar character."

The question then is whether at the date of the passing of the Finance Act, 1920, or at any time since, the company have been "carrying on any trade or business, or any undertaking of a similar character." The Special Commissioners have found as a fact that they have not been doing so; and there is nothing in my view to indicate that in so finding the Commissioners have done more than come to a conclusion of fact or have put any legal construction on the words of the statute. Further, the learned judge has definitely come to the same conclusion, and speaking for myself, I am unable to see how the operations of the company since the year 1906 can be properly described in any ordinary meaning of the words as a carrying on of a trade or business or any undertaking of a similar character.

The company did at one time carry on a trade or business which they have disposed of, and they are now merely in the position of receiving the purchase money resulting from the out and out sale of that business. If the company had been a mere individual or individuals they would certainly be held to have ceased to carry on any trade or business, and to be living on the proceeds of the disposal of his or their

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former trade or business. I cannot see that the fact of the company being a corporation makes any difference in this respect. The fact that they keep a staff for the distribution of their income between their shareholders and the holders of their debenture stock seems to me to make no difference. Such a process of distribution cannot be called in any ordinary sense of the words "carrying on a trade or business, or any similar undertaking." No doubt the company are acting within the powers of their memorandum of association; but every company must be supposed to do this. To come within the statute they must not only act within their powers, but act in such a way as to be carrying on a trade or business or a similar undertaking.

The *Korean Syndicate Case* (1) has been cited as being in favour of the appellants' contention, but the facts there are quite different. There the syndicate had disposed of their concession on the terms that the purchasers should work it and pay them a percentage of the profits. They were directly interested in the working through their purchasers, and were in the position of sleeping partners. Rowlatt J. had held that the arrangement amounted to a lease and that the syndicate were not liable. The Court of Appeal did not indicate that on this view of the transaction he would have been wrong; they differed as to the nature of the transaction. Till the year 1906 the South Behar Company may have been in a position analogous to that of the Korean Syndicate; but as from that year they were in an even more detached position than that of a lessor or even of an owner of a rent-charge. They were merely owners of an annuity, having no relation at all to the railway except as a matter of history.

The *Marine Steam Turbine Company Case* (2) is, like the *Korean Syndicate Case* (1), a decision on a somewhat different statute from that now in question, and is therefore only useful by way of analogy. But so far as it is applicable the decision in that case is in favour of the company here, and it is to be remarked not only that the annuity here, though

(1) [1920] 1 K. B. 598; [1921] 3 K. B. 258.
(2) [1920] 1 K. B. 193.

perpetual, represents a purchase price just as much as the terminable annual payments did there; but that the payments here are completely detached from any business, while there they continued to arise from the business sold by the Marine Steam Turbine Company.

In this case I differ from the majority of the Court. I think that the learned judge was right and this appeal should be dismissed.

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In this case it is admitted that under the constitution of the company the members of the club and the members of the company are necessarily identical. This is clearly shown by the form of application which has to be made in writing and signed by each candidate before election. That application is addressed to the honorary secretary of the Eccentric Club, Ld., and contains an agreement by the candidate to become, if elected, a member, and to be bound by the memorandum and articles of association and by-laws of the club. Such an agreement is undoubtedly sufficient within s. 24, sub-s. 2, of the Companies (Consolidation) Act, 1908.

The club is thus in substance an ordinary members' club, since it is managed by the members for the members as completely as if the property of the club were vested in the ordinary way in trustees and the management of the club were conducted by a committee of the members, and the sole question of law is whether the circumstances that the members of the club are formed into a corporation, and that as a matter of law the property of the club and the management of its affairs are vested in that corporation, are sufficient to bring the company within the definition of sub-s. 2 (*a*) of s. 52 of the Finance Act, 1920.

Within some of the words of the sub-section the club by its incorporation must undoubtedly fall; they have become and are a British company; but are they a British company carrying on any trade or business or any similar undertaking? They contend that their activities do not partake in any way

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of the nature of a trade or business, but consist solely in the supply to their own corporators of the ordinary amenities of a social club. They insist that this limitation of activities to a system of self-supply altogether differentiates their enterprise from that of an individual or company carrying on an ordinary proprietary club with the object of making a profit out of the supply of club amenities, and they rely in support of this contention on the reasoning of the majority of the House of Lords in *New York Life Insurance Co.* v. *Styles.* (1)

In my judgment this contention is correct, and the reasoning of the majority there is completely applicable here. In the speeches of each of the majority of four, Lord Watson, Lord Herschell, Lord Bramwell and Lord Macnaghten, there was a clear recognition of two principles: the first was that no difference was made by the mere fact that the actual dealing was with an incorporated company when in substance the insurer and the insured were the same; and the second was that in the case of such a scheme of mutual insurance not only were there no profits but (the important point here) there was no question of a trade or business in any ordinary sense of the words. On the same principle it seems to me that the present case stands as a question of substance on the same footing as if no incorporated company had been interposed between those who are mutually providing and receiving social amenities, and accordingly that this process of providing these amenities cannot be considered the carrying on of a trade or business any more than the provision in that case of mutual insurance.

Mr. Hills, in the course of his careful argument, was driven to admit the difficulty of his position so far as resting on the words of sub-s. 2 (*a*) of s. 52 only, and he sought to extend the prima facie meaning of these words by the reference to mutual trading concerns in sub-s. 2 (*a*) of s. 53. But to this argument, quite apart from the consideration that it would hardly be appropriate to enlarge a definition section by the language of a section aimed at processes of calculation, there appears to be this conclusive answer. The phrase "mutual

(1) 14 App. Cas. 381.

trading concerns" involves "trading," which in itself is a word of rather narrower denotation than the earlier phrase "trade or business or any undertaking of a similar character"; and therefore cannot suggest the inclusion in the earlier and wider phrase of any activity or enterprise not already comprehended in that phrase.

I agree that the appeal should succeed in this case.

All three appeals allowed.

Solicitor for Inland Revenue Commissioners: *Solicitor of Inland Revenue.*

Solicitor for Westleigh Estates Company: *P. R. Christie, for Bullock, Worthington & Jackson, Manchester.*

Solicitors for South Behar Railway Company: *Sandersons & Orr Dignams.*

Solicitors for Eccentric Club: *J. D. Langton & Passmore.*

W. I. C.

[IN THE COURT OF APPEAL.]

NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND *v.* CHARNLEY.

Company—Mortgage by, of Land and Chattels—Registration—Omission to mention Chattels in Register—Certificate of Registrar—Conclusiveness of, as to Registration of Chattels—"Demise" of Chattels—Right to realize Security—Equitable Floating Charge—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93, *sub-ss.* 1, 5.

A company with the object of securing payment of its overdraft at the plaintiff bank "demised" to the bank a certain leasehold factory with all the movable "plant used in or about the premises" for a term of about 996 years. The bank sent the indenture to the registrar of companies for registration under s. 93 of the Companies Act, 1908. In the particulars required to be filed pursuant to that section the instrument was described as a mortgage of the leasehold premises, no mention being made of the chattels. The registrar entered the description of the instrument in the register in similar terms, identifying it by its date, and omitting all mention of any charge on the chattels. Subsequently the sheriff, in execution of a judgment recovered by the defendant against the company, seized certain chattels of the company upon the

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mortgaged premises, including certain motor vans. The bank claimed the goods in question under their mortgage, and obtained from the registrar a certificate "that a mortgage or charge dated"—specifying the date and the parties to the instrument—"was registered pursuant to s. 93 of the Companies Act."

By sub-s. 5 of that section the certificate of the registrar is made "conclusive evidence that the requirements of the section as to registration have been complied with." On an interpleader issue to try the title of the bank as against the execution creditor:—

Held, (1.) that, as it was clear that the intention of the parties was to confer a charge on the chattels by the mortgage deed, the fact that the word "demise" was not the most apt for that purpose was immaterial, and, as the contract did not expressly deprive the bank of the right to apply to the Court to realize their security for them, they had a sufficient right of indirect realization to allow of the instrument being treated as an equitable charge and as passing an interest in the chattels, which took precedence of the claim of the execution creditor.

(2.) That, as the certificate identified the instrument of charge, and stated that the mortgage or charge thereby created had been duly registered, it must be understood as certifying the due registration of all the charges created by the instrument, including that of the chattels, and that it was conclusive evidence of the due registration of the chattels none the less because the register in omitting to mention them was not merely defective but misleading.

(3.) That the motor vans, being garaged at the factory and loaded there with the products of the factory, were "plant used in or about the premises" within the meaning of the deed of charge.

APPEAL from the judgment of Branson J. on the trial of an interpleader issue at the Liverpool Assizes.

On July 16, 1921, the Fylde Bacon Curing Company executed in favour of the National Provincial and Union Bank of England an indenture of mortgage or charge whereby they covenanted to pay on demand to the bank all such moneys as should from time to time be owing from them to the bank, and "for securing the payment of the moneys aforesaid" they did "demise unto the bank the hereditaments and premises described in the schedule hereto together with all and singular the fixed and movable plant machinery and fixtures implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises To hold the same for the residue of the term of years granted thereon by the indenture of lease of January 1, 1918, mentioned in the schedule save and except the last ten days of the term." It appeared from the schedule

that the hereditaments referred to consisted of 915 square yards of leasehold land with a bacon-curing factory thereon at Copse Road, Fleetwood, which had been let on January 1, 1918, for a term of 999 years, and had been sublet by the lessees to the Fylde Bacon Curing Company on April 26, 1921. On July 25, 1921, the bank carried in the above indenture for registration under s. 93 of the Companies (Consolidation) Act, 1908. Under that section the party demanding the registration of the mortgage is required to file particulars in the form prescribed by the Board of Trade. On the first page of the form so prescribed, Statutory Rules and Orders, 1909, Form No. 47, are set out the six classes of instrument to which s. 93 applies—namely :—

"(*a*) a mortgage or charge for the purpose of securing any issue of debentures ; or

(*b*) a mortgage or charge on uncalled share capital of the company ; or

(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale ; or

(*d*) a mortgage or charge on any land wherever situate or any interest therein ; or

(*e*) a mortgage or charge on any book debts of the company ; or

(*f*) a floating charge on the undertaking or property of the company."

In the margin there is a direction "Strike out the sub-heads (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*), which do not apply." The bank struck out all the sub-heads except (*d*). On the second page of the form under the heading "Date of the instrument creating or evidencing the mortgage or charge and description thereof" the entry was "July 16, 1921. Mortgage." Under that of "Amount secured by the mortgage or charge" the entry was "All sums now due or to become due." Under that of "Short particulars of the property mortgaged or charged" the entry was "915 square yards leasehold land with bacon-curing factory and buildings thereon. Copse

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Road, Fleetwood. 999 years from January 1, 1918." And the name of the mortgagees or persons entitled to the charge was stated to be that of the plaintiff bank. Similar entries were made by the registrar in the register, except that the amount secured was stated to be "All moneys, &c." No mention was made in the register of the chattels. On February 23, 1923, the bank recovered judgment against the company for 17,008*l.* in respect of their overdraft. On April 18, 1923, the sheriff seized certain chattels, including five motor vans, belonging to the company and being then on the premises so mortgaged, under a fi. fa. on a judgment recovered by one Charnley against the company. The bank at once claimed the goods so seized. On April 27 the company passed a resolution for voluntary liquidation, and on May 15 a receiver for the bank was appointed by the Court. On May 9 an interpleader issue was directed to try the question whether goods seized were at the date of the seizure the property of the bank as against Charnley, the execution creditor. On May 29, 1923, the Registrar of Joint Stock Companies gave his certificate in the following form: "Companies Registration Office, 29 May, 1923. I hereby certify that a mortgage or charge dated July 16, 1921, and created by the Fylde Bacon Curing Company for securing all moneys then due, or thereafter to become due or from time to time accruing due from the company to the National Provincial and Union Bank of England on any account whatsoever was registered pursuant to s. 93 of the Companies Act, 1908, on July 25, 1921." The interpleader issue was tried at the Liverpool Assizes before Branson J., who held (1.) that the deed of July 16, 1921, created an equitable floating charge upon the chattels; (2.) that he could not go behind the certificate of the registrar, and that therefore the deed must be regarded as properly registered, notwithstanding the omission of any mention of the chattels in the register; (3.) that being a charge or security for an acknowledged debt it was exempted by s. 17 of the Bills of Sale Act, 1882, from the necessity of registration as a bill of sale; and (4.) that the motor vehicles seized by the sheriff were "movable plant used in or about

the premises" within the meaning of the deed. He accordingly gave judgment for the bank.

The execution creditor appealed.

Haydon K.C. and *Jolly* for the appellant. The instrument dated July 16, 1921, conferred no charge upon the chattels. The expression "demise" is inapplicable to chattels, in the sense that it cannot pass an interest in them. It cannot be construed as an assignment, for the right to the bank over them was limited to the term. A demise of chattels for a definite time, however long, is inconsistent with a charge on them; it can confer nothing more than a right to use them. In *Southport and West Lancashire Banking Co.* v. *Thompson* (1) it was held that a mortgage of leasehold property by sub-demise will not pass trade fixtures in the absence of a clear intention to that effect on the face of the deed, the reason being that the mortgagee is only entitled to use the fixtures for a time, and that the right to sever them remains in the mortgagor at the end of the term. It may be that if a house were let furnished the execution creditor of the landlord could not seize the furniture, but that would be because of the tenant's possession of it. The present case is not analogous, for here there was no entry by the bank. The deed was merely a demise for a term unaccompanied by any bailment. The deed here could not be treated as giving an equitable floating charge, for it is an essential condition of such a charge that the chargee should have a right to realize his security by sale, and that the bank had not got: *Southport and West Lancashire Banking Co.* v. *Thompson.* (1)

Then if the deed was not a charge, it was a "license to take possession of personal chattels as security for a debt" within s. 4 of the Bills of Sale Act, 1878, and, as it is not saved by s. 17 of the Bills of Sale Act, 1882, not being a "debenture" within the meaning of that section, it required registration as a bill of sale, and consequently, not having been registered under the Bills of Sale Act, 1878, it was void.

If however the deed did amount to a charge it was still

(1) (1887) 37 Ch. D. 64.

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void, for not having been properly registered under s. 93 of the Companies Act, 1908. By that section a mortgage or charge by a company of the various kinds therein mentioned is void against any creditor of the company "unless the prescribed particulars of the mortgage or charge together with the instrument (if any) by which the mortgage or charge is created or evidenced" are delivered to the registrar of companies for registration within twenty-one days after its creation. Here the prescribed particulars were not so delivered, for they did not specify the amount secured. The object of registration is mainly to give information to future creditors as to the extent of the company's indebtedness and the consequent amount of credit that they can safely give to the company. If an indefinite statement of the amount secured is enough, however small the company's indebtedness may be, no future creditor can ever in such a case safely give the company any credit at all. Secondly, the particulars make no mention of the chattels as being any part of the property charged. On the contrary, the bank, on the first page of the particulars, when dealing with the direction to strike out the classes of charge which did not apply, struck out all except (*d*), thereby in terms stating that they did not require registration of any charge on chattels, but only on leasehold property. Had they wanted registration of a charge on the chattels they should have left in (*c*) and (*f*). The bank having thereby brought about the registration in the limited form in which it was made cannot be heard to say that anything more was registered than appears on the face of the register. It is true that by sub-s. 5 the registrar's certificate is to be conclusive evidence that "the requirements of this section have been complied with," that is to say that the registrar has performed the duty imposed upon him, but that duty was only to register what he was asked to register, and he was only asked to register the leasehold. The certificate is not binding as to the chattels. Moreover the certificate, like the particulars, must state "the amount thereby secured." Here it did not, therefore it was in effect no certificate at all.

But even if the execution creditor is wrong on all the above points, the motor vehicles are not within the language of the deed of charge. They were not "plant used in or about the premises." They were not "plant," for that expression is properly applicable only to things which are essential to production: *In re Nutley and Finn.* (1) Nor were they used in or about the premises, for though they were garaged there they were so only at a time when they were not being used. In *Yarmouth* v. *France* (2) it is true that a majority of the Court held that a horse used by a wharfinger to draw his carts away from the wharf was "plant connected with or used in the business of the employer" within the Employers' Liability Act, 1880; but the words of that Act are very different from those in the instrument before the Court. In *London and Eastern Counties Loan and Discount Co.* v. *Creasey* (3) horses used by a cab proprietor in his business were held not to be "plant . . . . used in, attached to, or brought upon any . . . . land, factory . . . . or other place" within the Bills of Sale Act, 1878.

Cyril Atkinson K.C. and *Burgis* for the respondent. The contention that the registration in this case was bad by reason of the particulars omitting any mention of the chattels rests upon the fallacy of supposing that there were more charges than one to be registered. There was only one instrument to be registered—namely, that of July 16, 1921, though no doubt it was a charge on several items of property. Any prospective creditor of the company wishing to know what encumbrances it had outstanding could examine the register, and would there find an entry identifying this particular instrument, and he could make sure what that instrument precisely covered by inspection at the company's office of the copy of the instrument of charge which under s. 101 of the Act of 1908 the company is required to keep for purposes of inspection. The duty of the registrar is defined by s. 93, sub-s. 2. He is to enter with respect to every mortgage or charge the date of creation, the amount secured, short

(1) [1894] W. N. 64. (2) (1887) 19 Q. B. D. 647.
(3) [1897] 1 Q. B. 768.

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particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge. He is not to take the extent of his duty from the particulars supplied to him. The duty is imposed on him of deciding whether sufficient particulars of the charge have been given. It is not a matter for the Court. Having decided that they are sufficient, and having registered the deed, he is to give his certificate, which is to be "conclusive evidence that the requirements of the section have been complied with." The object of that provision was pointed out by Cozens-Hardy M.R. in *In re Yolland, Husson and Birkett* (1): "It was quite obvious that in the case . . . . of all securities requiring registration under this section it would be so difficult as almost to be impossible for the person entitled, or claiming to be entitled, to the charge to prove that all the requirements in this section had been complied with. . . . . The Legislature thought that that would be an unendurable state of things." The provision was intended to relieve the person tendering the document for registration from the burden of ascertaining whether the registrar had done his duty. The effect of the certificate here is to show that the deed of July, 1921, was duly registered and was valid as regards every interest that passed under it, including the charge on the chattels.

Then as to the construction of the instrument. The word "demise" is not inapplicable to chattels, it is the word used in precedents of leases of furnished houses. Here no doubt the bank did not get possession of the chattels, but they had an equitable right in respect of them which was good against the sheriff until the judgment under which he seized was executed by sale, and that equitable right became crystallized on the appointment of the receiver. No particular form of words is necessary to create an equitable charge, it is enough to show an intention of the parties to create it. As Lord Macnaghten in *Brandt* v. *Dunlop Rubber Co.* (2) said of an equitable assignment of a debt: "The language is immaterial if the meaning is plain." No doubt it is essential to constitute an equitable charge that the person to whom

(1) [1908] 1 Ch. 152, 158. (2) [1905] A. C. 454, 462.

it is given should have a right of realizing his security by sale, and although, as was held in *Southport and West Lancashire Banking Co.* v. *Thompson* (1), where leasehold property with trade fixtures on it is mortgaged by sub-demise, the mortgagee will prima facie have no right to sever the fixtures and sell them as chattels, he will always be entitled to go to the Court and ask for a sale; and the bank has the same right here to ask for an order for the sale of the chattels charged.

The language of the deed was intended to cover all the chattels on the factory premises, including the motor vehicles. They are both "plant" and "machinery," and are "used in or about the premises," for they are not only garaged there, but also loaded and unloaded there.

Haydon K.C. in reply. The suggestion that the omission to mention the chattels in the register would create no hardship upon a prospective creditor, because he could always see the copy of the mortgage deed at the company's office under s. 101, is misconceived. Sect. 100 requires the company to keep a register of mortgages and charges of its own, and s. 101, sub-s. 1, provides that: "The copies of instruments creating any mortgage or charge requiring registration under this Act with the registrar of companies, and the register of mortgages kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe." An existing creditor may inspect the copies of instruments as well as the company's register, but a prospective creditor is only entitled to inspect the register, he cannot see the copies of instruments, and it is the prospective creditor who especially needs protection.

BANKES L.J. This is an appeal from a judgment of Branson J. which raises the questions whether a certain mortgage document created a floating charge upon certain

(1) 37 Ch. D. 64.

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chattels of the mortgagors, and whether, if it did, it was valid having regard to the provisions of s. 93 of the Companies (Consolidation) Act, 1908. The material facts are these. On July 16, 1921, the Fylde Bacon Curing Company entered into a deed with the respondents, the National Provincial and Union Bank of England, for the purpose of securing advances by the bank to the company, and in pursuance of the Act of 1908 the bank caused particulars of that document to be carried in to the registrar for registration, and some two years afterwards the registrar issued his certificate that the document had been duly registered. In the meantime, on February 15, 1923, the defendant Charnley recovered judgment against the company, and put in execution. The bank then claimed the chattels which had been seized, and an interpleader issue was directed to try the question whether at the time of the seizure by the sheriff the goods were the property of the bank, as against the execution creditor.

The first point to be considered is whether the deed of July 16, 1921, created a charge upon those chattels, for if it did not it is clear that it came within the definition of a bill of sale and would be void for want of registration under the Bills of Sale Act. It is quite clear that no particular form of words is necessary for the purpose of creating a charge. It is enough that the parties have made it plain by the language they have used that it was their intention to create it. But though no definition of the words necessary to constitute a charge can be given, I think it is plain that the contract between the parties must, either expressly or by implication of law, confer on the person in whose favour the alleged charge is given some right of realizing his security. It may be that that right is expressly conferred by the terms of the agreement, or it may be that if the right is not excluded by the terms of the agreement the party in whose favour the charge is given would have, as attached to it, the right of invoking the assistance of the Court by the appointment of a receiver or by an order for sale. I was at one time pressed by Mr. Haydon's argument by reason of what was said by Cotton L.J. in *Southport and West Lancashire*

Banking Co. v. *Thompson* (1), where, dealing with a mortgage by way of sub-demise of leasehold land with fixtures, he said: "If the mortgagee is seeking to remove them" (the fixtures) "and sell them he must have express power given him by the mortgagor to do so; otherwise he can only take them with the land without any right of removing them. That right of removal and sale will remain in the mortgagor, the tenant, unless he expressly parts with it, and gives power to the mortgagee who takes by demise from him." Mr. Haydon's argument was that that was an authority for the proposition that, the chattels here being demised for a term, the mortgagee had no right of realizing his security by sale. But on consideration I think that the passage cited does not warrant that conclusion. What the Lord Justice was there speaking of was the original right of the mortgagee under the demise, and not to the rights which come into existence when the security has crystallized, as by the appointment of a receiver, or by circumstances having arisen which entitled the holder of the charge to apply to the Court for a sale. Apart from the fact that the document here is drawn in the form of a demise for a term of years, it contains all the elements necessary for the creation of a charge. That it was the intention of the parties to create one is plainly indicated by the language used. But it is said the use of the term "demise" is so inapt as applied to chattels that it must be read as excluding any intention of giving the bank a right to realize their security in respect of them. I think that if one reads the document as a whole the proper conclusion to draw is that the intention was to create a charge over the whole subject matter mentioned, whether land, fixtures, or chattels. Our attention has been called to a passage in Lord Lindley's book on company law which I should like to cite, as it exactly expresses what the right of the bank in the present case is. He says (2): "The decisions which establish the priority of debenture holders over execution creditors appear to be based on the following reasoning: an execution creditor has no greater right in goods seized than the debtor himself

(1) 37 Ch. D. 64, 69. (2) 6th ed., 324.

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has; a seizure cannot affect the rights of third parties in the goods unless they have in some way debarred themselves from asserting their rights; a person who takes a floating charge on a company's property only authorizes the company to deal with its property in the course of its business; an execution is a compulsory process against the property of the company, and is not a dealing by the company with its property, nor is the right to issue execution a right conferred by the company; consequently there is nothing in the nature of a floating charge to debar those entitled to it from asserting their charge against an execution creditor." That is exactly the present case. So far then as the nature of the document is concerned, it is in my opinion a floating charge, and apart from other considerations the bank are entitled to assert that it gives them a better title to the goods than that of the execution creditor.

But there is another question which has been raised, whether some of the chattels seized in the execution—namely, the motor vans, are covered by the words of the floating charge. The words are: "All and singular the fixed and movable plant machinery and fixtures implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively." It was said in the first place that the motor vans were not "plant." On the one hand it was held in *Yarmouth* v. *France* (1) that a horse used in the business of an employer was plant within the meaning of the Employers' Liability Act, 1880. On the other it was held in *London and Eastern Counties Loan and Discount Co.* v. *Creasey* (2) that horses used as cab horses are not plant for the purposes of the Bills of Sale Act, 1878. Having to choose between those two authorities, I come to the conclusion that, though "plant" may not be the most appropriate expression to use for the purpose, it is sufficient to cover these motor vans.

But then it was contended that even if, apart from the provisions of the Companies (Consolidation) Act, 1908, the document of July 16, 1921, gave the bank a valid floating

(1) 19 Q. B. D. 647. (2) [1897] 1 Q. B. 768.

charge over the chattels, including the motor vans, it was void by reason of non-compliance with the requirements of s. 93 of that Act. That section provides that every mortgage or charge of any of the several classes therein specified shall be void against any creditor of the company "unless the prescribed particulars of the mortgage or charge together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within twenty-one days after the date of its creation." We are not dealing here with a mortgage or charge created otherwise than by an instrument. As to what the position might be in reference to the soundness of Mr. Haydon's contention if the mortgage or charge was created by parol I am not prepared to express any opinion. But where a mortgage or charge is created by an instrument, it seems to me quite impossible to treat that mortgage or charge otherwise than as one indivisible transaction, even though it covers several different items and different kinds of property, because it is evidenced by one instrument and one instrument only, and it is to that mortgage or charge so created by one indivisible instrument that the section, when requiring performance of the conditions necessary to prevent its avoidance, refers. Those conditions are that the prescribed particulars and the instrument by which the charge is created shall be delivered to the registrar within twenty-one days. It is not disputed, as I understand it, that the object of the Legislature in requiring delivery to the registrar of the instrument as well as the particulars is to enable him to form an independent judgment in reference to what he ought to put on the register before he in fact registers it, and if he is entitled to do that, being only human, he may make a mistake, and if he makes a mistake and enters on the register something different from what the particulars really justify, the unfortunate person carrying in those particulars will, according to Mr. Haydon, find himself possessed of a void instrument, because the register, which, as I understand Mr. Haydon's argument, is the conclusive document, does not contain true particulars

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of the instrument. I agree with the judgments in *In re Yolland, Husson and Birkett* (1), to which we have been referred, as to the object of the statute. I think the object is to protect the grantee of the charge, and, as between him and the general body of creditors or prospective creditors, the registrar is appointed as the tribunal to decide what shall be put upon the register, and when it has been put there his certificate to that effect is conclusive evidence that all the requirements of the section have been complied with. One of those requirements, as I have already said, is that the prescribed particulars must be delivered, and we have been referred to the Statutory Rules and Orders, 1909, which contain the prescribed form of particulars, Form 47. One of the particulars required by that form is the "amount secured by the mortgage or charge," and Mr. Haydon has argued that in order to satisfy that particular it is necessary to state the actual amount in pounds, shillings and pence. But in order to support that argument he was obliged to go the length of admitting that though it was insufficient to say "all sums now due or to become due," it would have been sufficient if it had gone on to say "not exceeding —— *l.*," specifying some ridiculous amount in millions. But I do not think the Legislature intended such an absurd result. To my mind it would be in compliance with the form if the statement had been that the amount secured was the amount due from day to day upon the current account, whatever it was, with the bank. Another head in the form of particulars is "Short particulars of property mortgaged or charged," and under that head no reference was made to the chattels. It is quite true that there is an omission, because the property mortgaged or charged included chattels as well as land and fixtures; but when once the registrar has given his certificate that the registration was complete, and that the mortgage or charge was created by an instrument, identifying it, in my opinion you have to go to the instrument to see what was actually charged, there being nothing in the statute which says that when once registration

(1) [1908] 1 Ch. 152.

has taken place the register shall be the evidence of the extent of the charge. All that the statute requires is satisfaction on the part of the appointed official that the preliminaries have been complied with, and, when once he certifies that, the parties are entitled to ask the Court to say that what it has to look at in order to determine their rights is the instrument creating the mortgage or charge. For these reasons I think the view taken by the learned judge was right, and that this appeal should be dismissed.

SCRUTTON L.J. The facts of this case may be stated very shortly. Mr. Charnley was an unsecured creditor of the Fylde Bacon Curing Company for a sum of about 200*l*. He got a judgment against them on February 15, 1923, and he issued execution. The sheriff went in and seized a number of articles, including some motor vans. The sheriff being in possession was met by a claim from the National Provincial and Union Bank, that they had allowed the company a heavy overdraft secured by a document, and that that document gave them a right or interest in the property seized which took precedence of the claim of the execution creditor. An interpleader issue was directed to try that question, and on the argument a large number of points were raised. The first point to be decided is whether the overdraft agreement confers on the bank what is called an equitable charge or security in respect of the property seized. I am not going to attempt an exhaustive definition of an equitable charge, but I think that the substance of an equitable charge is this: if an agreement be made to grant some interest in existing or future property for the purpose of securing the payment of a debt, that agreement to give the security confers an equitable security or charge, though all the formalities necessary to create the actual security have not yet been complied with. Equity treats that as done which ought to be done. In this case the company covenant with the bank to pay on demand all such sums of money as now are or shall from time to time be owing by them to the bank, and then for further securing the payment of those moneys (which now amount to

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the large sum of 17,000*l.*), demise to the bank their leasehold interest in the factory, together with the fixed and movable plant and chattels used in connection with the business. That document seems to me to contain all the requisites of an equitable charge ; there is an agreement to give an interest in existing or future specific property, and it is given to secure the payment of a debt ; and the equitable charge so created on that property is one which can be asserted by the bank not only against the owner of the property but also against the execution creditor, who cannot stand in a better position than the owner whose goods he has seized. I do not propose to go into the numerous authorities which have been cited, but Atkin L.J. has reminded me of *Holroyd* v. *Marshall* (1), where this very matter was discussed. It seems to me that the argument which Mr. Haydon has addressed to us proceeds very much on the lines of the judgment of Lord Campbell in that case, and the argument of Mr. Atkinson on those of the judgments of Lords Westbury and Wensleydale, reversing that of Lord Campbell. I mention that without referring to the details of the judgments, because that indicates the lines on which I have come to the conclusion that this agreement of demise constituted an equitable charge on the existing property and future property when acquired.

But it was argued by Mr. Haydon that even if the agreement did create a charge it was invalid, because it was never properly registered, and at first sight he made out a strong case. He said : " You are claiming an equitable interest in chattels ; you had to register ; you did in fact send to the registrar a request for registration which spoke only of a mortgage on land, and struck out any claim that it was a floating charge on the property of the company ; and the registrar only entered on the register a mortgage on the land, omitting the charge on the chattels, so that if a person who proposed to give credit to the company had inspected the register before doing so he would have been misled into supposing that there was no charge on the chattels, but only on the land." He admits that his client did not in fact inspect the register,

(1) (1862) 10 H. L. C. 191.

but he says that he must be treated as if he had, and if he had he would have been deceived. That undoubtedly looks a formidable argument, but the trouble is that the statute provides by s. 93, sub-s. 5, that the registrar's certificate of registration is to be conclusive evidence that the requirements of the section have been complied with. Here the registrar gave his certificate in this form: "I certify that a mortgage or charge dated July 16, 1921, and created by the Fylde Bacon Curing Company for securing all moneys then due or thereafter to become due or from time to time accruing due from the company to the National Provincial and Union Bank was registered pursuant to s. 93 of the Companies Act, 1908, on July 25, 1921." One of the reasons for that provision as to the conclusiveness of the certificate is that the person whose duty it is to register the charge is the company (sub-s. 7), the party giving it, not the party to whom it is given. The company may give such charges to a large number of debenture holders, who do not see the particulars, and very likely are not in a position to examine the register. The object of the certificate in that case is to prevent the debenture holders' security from being upset if it turns out that the company or the registrar has made a mistake as to what has been put on the register. I am bound to say that the language of the statute is rather puzzling: "Every mortgage or charge created by a company . . . . shall be void unless the prescribed particulars of the mortgage or charge . . . . are delivered . . . . to the registrar . . . . within twenty-one days." That makes the avoidance depend on the neglect to send in the particulars. The neglect to register the charge will not make it void. Then when the registrar has got the particulars and the instrument creating the charge, he is to enter in the register, not the particulars delivered by the company, but the date of the instrument and its description, the amount secured, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge. So that there is a possibility, first, of the company making an error in delivering the particulars, and secondly of the registrar

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making an error either in omitting to enter something specified in the particulars, or in misunderstanding the instrument of charge delivered to him with the particulars; and for that reason one can well understand a clause being put in in favour of the grantees of the charge, who are not the persons whose duty it is to deliver the particulars, that if the registrar gives a certificate that all is in order that certificate shall be conclusive evidence that the requirements as to registration have been complied with. The result of the legislation as it appears to me is that if the document sent in for registration does contain a charge on particular property, even if the company sending it in has misstated that charge, or the registrar considering it judicially has misunderstood it, when once the certificate has been given the grantees are safe. Though one can see that this may cause great hardship to a person who gives credit to the company in reliance on a defective register, one can also see that equal hardship would be caused to secured creditors if their security was to be upset for reasons connected with the action of persons over whom they had no control. For these reasons I take the view which was taken in *In re Yolland, Husson and Birkett* (1) and *Cunard Steamship Co.* v. *Hopwood* (2) that the giving of the certificate by the registrar is conclusive that the document creating the charge was properly registered, even if in fact it was not properly registered. I do not know how the difficulty arose in this case. It looks as if somebody was very careless on behalf of the bank, and also as if somebody was very careless in the registrar's office.

The next point taken by Mr. Haydon was that the certificate was all wrong, in fact was not a certificate at all, because it did not state the amount secured. It was urged that both in he particulars and in the certificate you must have a definite amount stated, and that it is not enough to say "the amount from time to time to become due on an overdraft." I think that is an impracticable contention. That is certain which can be made certain, and the actual amount of the company's indebtedness at any moment can be easily

(1) [1908] 1 Ch. 152. (2) [1908] 2 Ch. 564.

ascertained. I should like to add that I do not think the registrar's practice of entering in the register the amount secured by the charge as "All moneys, etc.," is a proper way of keeping the register. It may be that those words would be reasonably plain to a person acquainted with the documents in the case, but to the average creditor they might well convey no meaning at all.

That brings me to the last question raised, which is one of fact. The goods seized included five motor vans, the value of which it is said would more than cover the amount of the judgment debt. It is said that those motor vans are not covered by the charge, because they are not plant used in or about the premises. I think it is fairly clear that a motor van is plant, much more so than a horse, which has been held by the Court of Appeal to come within that term. And further I think these motor vans were "placed upon or used in or about the said hereditaments." A thing does not cease to be placed upon or used in premises because it is sometimes placed or used outside the premises. For these reasons I think that all the points raised by Mr. Haydon fail. I think that the bank had an interest in the goods seized which took precedence of the rights of the execution creditor, and that the appeal must consequently be dismissed.

ATKIN L.J. In this case the appellant, a judgment creditor of the Fylde Bacon Curing Company, caused certain goods of the company to be seized in execution, whereupon the respondent bank claimed the goods under a document dated July 16, 1921. They say that that gives them either a mortgage or a charge upon the goods which entitles them to priority over the judgment creditor, and that is the issue which has to be determined. The first question that arises is whether or not this document does create a mortgage or charge, and to determine that it is necessary to form an idea of what is meant by a "charge." It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall

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be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge. If, on the other hand, the parties do not intend that there should be a present right to have the security made available, but only that there should be a right in the future by agreement, such as a licence, to seize the goods, there will be no charge. I think the distinction cannot be made clearer than by comparison of the cases of *Holroyd* v. *Marshall* (1) and *Reeve* v. *Whitmore*. (2) In the latter case Lord Westbury, who was sitting on appeal from Kindersley V.-C., said: "The principal question . . . . is whether the assignment by way of mortgage from Simpson to Green operates as a present contract with respect to the bricks and the clay, and the materials that might thereafter be brought upon the premises by Simpson. If there were upon the face of the deed either expressly, or if there could be collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgagee should have a security attaching immediately upon future chattels to be brought on the premises, then, undoubtedly, the contract would have given to the mortgagee, Green, a present interest in all those materials, whether manufactured or raw, which might be brought on the brickfield, after the date of the security." In that case, on considering the terms of the instrument and finding in it no words expressly giving a present right, but, on the contrary, giving a future right, a licence to seize the goods that might come there, he came to the conclusion that there was no equitable charge. Looking at the document in this case upon the lines that I have suggested, I think it is beyond controversy that the parties have shown their intention to make this

(1) 10 H. L. C. 191. (2) (1864) 33 L. J. (Ch.) 63, 65.

property, existing and future, available as security. The terms of the document are: "That for further securing the payment of the moneys aforesaid"—that is money due and to become due—"the mortgagors do hereby as beneficial owners demise unto the bank all and singular the hereditaments and premises . . . . together with the fixed and movable plant . . . . now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively to hold the same unto the bank for the residue of the term," which is about 996 years. Under these circumstances it appears to me quite plain that the parties intended that the property there mentioned should be made available as security for the payment of the debt referred to, and that they did in fact thereby create a charge. The question might arise whether or not it was a mortgage in the strict sense. There was undoubtedly created by the instrument a legal mortgage of the leasehold by way of sub-demise, and if the instrument had been confined to existing chattels I see no reason why it should not be construed as a legal mortgage of the chattels. It demises the chattels by deed, and I reserve for further consideration what would be the proper construction of a document which in terms "demises" to another person chattels to be held for a term of 996 years. It may well be that an instrument in this form ought to be construed as an assignment of the chattels, for it could hardly be contemplated that any of them would be likely to last for a term of 996 years. But that question does not arise here, inasmuch as the instrument speaks of future chattels to be brought on the premises, either by way of substitution or otherwise, and I think it is right to construe the document as creating a mortgage of the leasehold and a floating equitable charge upon the chattels.

That being so, the document required to be registered, for otherwise under the provisions of s. 93 of the Act of 1908 it would be void as against creditors of the company, including the judgment creditor in this case. There may well be a question whether all the strict requirements of that section as to registration were complied with in respect to the

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particulars and the form of the register, for neither the particulars nor the register contain any reference to the charge upon the chattels, and anybody examining the register would be led to assume that the charge only covered the hereditaments. But that does not determine the question, because of the provisions of sub-s. 5. [His Lordship read the subsection, and also the terms of the certificate given in this case by the registrar.] It appears to me to be the true view that when once such a certificate has been given by the registrar in respect to a particular specified document which in fact creates a mortgage or charge, it is conclusive that the mortgage or charge so created is properly registered, even though the particulars put forward by the person applying for registration are incomplete, and the entry in the register by the registrar is defective. That I think follows from *In re Yolland, Husson and Birkett.*(1) That case was decided under the Act of 1900, but the corresponding section of that Act was in substantially the same terms. I desire to refer to two passages, one in the judgment of Cozens-Hardy M.R. and the other in that of Fletcher Moulton L.J. What the Master of the Rolls said was this : (2) "It was quite obvious that in the case particularly of debentures, and indeed of all securities requiring registration under this section, it would be so difficult as almost to be impossible for the person entitled, or claiming to be entitled, to the charge to prove that all the requirements of this section had been complied with ; it would have been almost worse than perusing an abstract of title to a freehold or a leasehold estate. The Legislature thought that that would be an unendurable state of things." He then read the section, s. 14, sub-s. 6, providing that the registrar should give his certificate, which should be "conclusive evidence that the requirements of this section as to registration have been complied with," and said : "That means not merely that he has done his mechanical duties, but that that has been done which is required to be done by any person upon whom a duty is imposed by this Act in order to get the benefit of the security,

(1) [1908] 1 Ch. 152. (2) Ibid. 158.

including the company itself." I agree with that construction of those words. And Fletcher Moulton L.J. said (1): "It appears to me that this is an attempt to do that which the Legislature intended to prevent being done by the provisions of s. 14, sub-s. 6. It has taken a step greatly in favour of the general creditors of a company in requiring that all charges should be registered; and, on the other hand, it has protected those who hold charges properly created by saying that the certificate of the public officer, the registrar, that the requirements of registration have been fulfilled shall be conclusive evidence that such is the fact, and it has given such importance to that certificate that it has made it the statutory duty of the company to indorse that certificate upon all their debentures." That decision seems to me to show that the Legislature, while imposing upon companies the obligation of registration in the interest of their creditors or other persons having dealings with them, was quite alive to the difficulties which that very obligation to register might cause to the holders of the company's securities. Every one is familiar with the technical points that have been raised from time to time under the Bills of Sale Acts, and with the fact that constantly bills of sale given in good faith have been defeated by non-compliance with the requirements of those Acts, and the Legislature, having that in view, intended to protect the secured creditors of companies from similar difficulties arising from having to comply with the technical requirements of registration, by providing that the registrar shall exercise his own judgment as to what he will register, and that when once he has certified that the mortgage or charge is registered the title of the creditor to his security shall b unassailable on the ground of the insufficiency of the registration. I think the certificate in this case removes any difficulty that might otherwise have arisen. I think it would be too narrow a construction to say that this indenture created both a mortgage and a charge, and that the certificate must certify the registration of both. The certificate here speaks of the registration of "the mortgage or charge dated July 16,

(1) [1908] 1 Ch. 160.

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1921." I think it must be read as meaning that the securities created by that instrument—securities for the payment of one and the same sum of money—have been properly registered. There is one matter that I should like to reserve. If in any case it could be established that the creditor for his own purposes intentionally abstained from mentioning part of his security in the particulars and in that way procured the registrar to enter only a part of the security on the register, it may be that as against a person who could show that he was misled by the partial registration the secured creditor could not set up the conclusiveness of the certificate. It is not necessary to decide that here.

The only other question is whether certain of the goods seized, the motor vans, come within the words of the instrument, "fixed and movable plant machinery implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises." I think a motor van is plant. If a horse used to draw vans for the purposes of a business is plant, as was held by this Court in *Yarmouth* v. *France* (1), a fortiori is a motor van. And I think these motor vans were "used in or about the premises," for they were not only garaged there, but were used for conveying the products of the factory to places outside, and for that purpose had to be loaded on the premises. I think there is ample ground for holding that they came within the words of the deed.

I agree that the judgment of Branson J. was correct, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *T. W. Hall & Sons, for J. R. Gaulter, Fleetwood.*

Solicitor for the respondents: *Thos. Jones, Manchester.*

(1) 19 Q. B. D. 647.

J. F. C.

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Dec. 10.

Extradition—Committal—Evidence since Committal—Jurisdiction to review Magistrate's Decision—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 11.

A magistrate committed an accused person to prison to await extradition to France. The accused obtained a rule nisi for a writ of habeas corpus on the ground that new evidence had arisen since the committal disproving his identity with the person against whom the warrant was issued. It was admitted that there was evidence upon which the magistrate was entitled to make the order and that he had the necessary jurisdiction:—

Held, discharging the rule, that the Court had no power to review the magistrate's decision upon the above ground and that the matter was one to be dealt with, if at all, by a Secretary of State in exercise of his powers under the Extradition Act, 1870, s. 11.

RULE NISI to the Governor of Brixton Prison to show cause why a writ of habeas corpus should not issue to him to bring up the body of Daniel Arthur Perry in order that he might be discharged from custody.

The prisoner Perry had been committed for extradition by the magistrate at Bow Street for larceny within the jurisdiction of the French Government. The grounds for granting the rule were (1.) that the decision to commit for extradition was against the weight of evidence; and (2.) that fresh evidence adduced since committal threw substantial doubt upon the identity of the prisoner with a person passing under the name of Watson, who was alleged to have committed the offence in question.

The facts, which were contained in depositions sent from France, in depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion, were shortly as follows: In December, 1922, a man passing under the name of Watson commenced negotiations in Paris for the purchase of a diamond brooch which one Prince Magaloff had been instructed to sell. On December 13, 1922, Watson obtained possession of the brooch from Prince Magaloff in Paris on the pretext of showing it to a prospective purchaser and absconded. A French handwriting expert

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to whom specimens of the handwriting of Watson and of the prisoner were submitted expressed the opinion that they were in the same handwriting. A warrant for the arrest of the prisoner was issued by the French magistrate in Paris on May 29, 1923, and on October 6, 1923, he was arrested in London on a warrant granted by the chief magistrate at Bow Street under the Extradition Act, 1870, at the request of the French authorities. On October 27, 1923, the magistrate, after several adjournments, made an order committing the prisoner to Brixton Prison to await extradition. The evidence consisted of the depositions of two witnesses describing the crime, the depositions of the French handwriting expert, together with the documents relied upon, and the oral evidence of two witnesses called to prove the identity of the prisoner. Of these latter, one identified the prisoner as Watson, the other stated that he was doubtful if the two were one and the same person. The prisoner in denying the charge said that he was not in Paris between December 8 and 13, 1922, and that he had never used the name of Watson. The order for a rule nisi was obtained on November 23, 1923.

At the opening of the case counsel for the prisoner abandoned the first ground of appeal, so that the only question argued was that since the committal fresh evidence had come to light upon which the Court should review the committal order.

Percival Clarke showed cause against the rule. The only questions which can be raised before this Court are, first, whether the magistrate had jurisdiction, secondly, whether there was evidence upon which he could commit. Both these questions must be answered in the affirmative. The Court has no jurisdiction to hear fresh evidence adduced since the committal. The law was so laid down by the Court in *Rex* v. *Governor of Holloway Prison* (1), in which doubts were expressed as to the observations of Denman and Hawkins JJ. in *In re Castioni* (2), which were to the effect that the Court could review the decision of the magistrate upon

(1) (1902) 71 L. J. (K. B.) 935, 937, 938. (2) [1891] 1 Q. B. 149.

the evidence. These observations are dicta only and are not reconcilable with *Reg.* v. *Maurer* (1) and *In re Meunier.* (2) In *In re Meunier* (2) Cave J. said: "The magistrate has a discretion in each case as to whether the evidence is or is not sufficient to justify a committal." Here the magistrate has exercised his discretion, and the prisoner's remedy is not upon application to this Court but to the Home Secretary for exercise of his powers under the Extradition Act, 1870, s. 11.

[SWIFT J. referred to Clarke on Extradition, 4th ed., p. 235, citing *Reg.* v. *Maurer.* (1)]

Roland Oliver in support of the rule. It is not here sought to upset the magistrate's decision upon the evidence before him, but upon fresh evidence enough to satisfy any reasonable person that this is a case of mistaken identity. The case of *Rex* v. *Governor of Holloway Prison* (3) was wrongly decided. The prisoner's remedy in these circumstances is not confined to an application to the Secretary of State under the Extradition Act, 1870, s. 11, but exists at common law by writ of habeas corpus.

[SWIFT J. That writ is only granted to relieve a prisoner in unlawful custody.]

The observations of Denman and Hawkins JJ., in which Stephen J. concurred, in *In re Castioni* (4), show that this Court has jurisdiction, where there is fresh evidence, to go into the question of evidence for the purpose of reviewing the magistrate's decision.

LORD HEWART C.J. In this case the only question argued was whether this Court upon fresh evidence will review the decision of the magistrate who has committed the accused for extradition, it being conceded that the magistrate had jurisdiction and also had evidence before him on which he might commit. In *In re Meunier* (2) Cave J. said: "The magistrate has a discretion in each case as to whether the evidence is or is not sufficient to justify a committal," the test being whether, if the offence had been committed in this

(1) (1883) 10 Q. B. D. 513.
(2) [1894] 2 Q. B. 415.
(3) (1902) 71 L. J. (K. B.) 935, 937, 938.
(4) [1891] 1 Q. B. 149.

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country, there would have been evidence justifying committal for trial. In the present case no doubt exists that when the magistrate had to decide whether to commit or not, there was evidence to show that the prisoner was the same person as Watson. This question of identity was in dispute and was considered by the magistrate, who decided that the prisoner was the same person as Watson and ought to be committed for extradition. It is now said that further evidence of a strong and indeed conclusive character has arisen which, side by side with the material before him, would have caused the magistrate to reach the opposite conclusion. The matter has been dealt with in several cases, and the principle is laid down in *In re Arton* (1) by Lord Russell C.J.: "We are not a Court of Appeal on questions of fact from him"—the magistrate. "We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit." Again in *Rex* v. *Governor of Holloway Prison* (2) Bigham J. said: "I think the only question that this Court can entertain is the question of jurisdiction"—and a little later—"He (the accused) may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he could commit or not." In the same case Darling J. said in words which obviously apply here: "Moreover this case is a peculiar one, because the evidence is evidence which has never yet been given, but which has been procured since the committal order was made. It is said that if the magistrate had had that before him, it is conceivable he would have come to a different conclusion; and that in any case where evidence is produced which a magistrate has not had before him, but which if he had had it before him might have affected his decision, this Court should order a rule for a habeas corpus to be made absolute. I think to do so in such a case would be to do what the Courts have never yet done." That is a statement of the law with which I respectfully agree. It is true that in *In re Castioni* (3) the law seems to be differently expressed; but

(1) [1896] 1 Q. B. 509, 518. (2) (1902) 71 L. J. (K. B.) 935, 937, 938.
(3) [1891] 1 Q. B. 149, 163.

as to that case two observations are to be made. First, the questions of mixed law and fact happened to be peculiarly interwoven with the question of jurisdiction. Secondly, if that case is intended to be an authority for the proposition that on a question of fact within the jurisdiction of the magistrate this Court will review his conclusion upon evidence subsequently arising, I agree with the view taken by the Court in *Rex* v. *Governor of Holloway Prison* (1), that to that extent the decision in *In re Castioni* (2) cannot be supported. It is argued for the prisoner that hardships may arise where a British subject is sent abroad for trial and matter of a conclusive character arises which if it had been before the magistrate would have prevented a committal for extradition. On this point it is to be observed that in all cases put by way of hypothesis the matter is presumed to be so clear that no reasonable person would send the accused for trial abroad. That is just the case provided for by the Extradition Act, 1870, s. 11. The question is not as to revising upon a conflict of testimony the conclusions of the magistrate, but merely of recognizing the unanswerable force of something which has unexpectedly arisen since the committal. In such a case the Secretary of State, acting under s. 11, would not order the accused to be surrendered to the foreign government, but would exercise his statutory powers in his favour. Those powers differ entirely from the powers of this Court. If the argument in support of this rule were right, it would follow that in every case of fresh evidence arising after the order of the magistrate this Court would, at the request of the accused, have to review the magistrate's decision.

Committal for trial in this country is in some respects not quite the same as committal for trial abroad, for instance, in the matter of compelling the attendance of witnesses. But this is an application for writ of habeas corpus, and if the writ is to issue, the right to it must arise from the view that the imprisonment is unlawful. Where the evidence is such that the magistrate is entitled to commit, this Court will

(1) 71 L. J. (K. B.) 935. (2) [1891] 1 Q. B. 149, 163.

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not review his decision because of evidence adduced since the committal. In such a case there is not unlawful imprisonment.

If this is a case for refusing to surrender the fugitive for trial abroad no doubt the Secretary of State will employ his powers under the statute. The argument on the question of hardship fails, and the rule must be discharged.

SANKEY J. I agree with the statement of Hawkins J. in his judgment in *In re Castioni* (1): "What follows afterwards shows that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad."

If the facts are in accordance with Mr. Oliver's contention the prisoner has his remedy with the Home Secretary, who will decide as to his ultimate surrender.

SWIFT J. I agree.

Rule discharged.

Solicitor for the Crown: *Director of Public Prosecutions.*
Solicitor for the prisoner: *Edgar Smith.*

(1) [1891] 1 Q. B. 149, 163.

F. P. F.

[IN THE COURT OF APPEAL]

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Banking—Banker and Customer—Implied Contract between—Obligation of Secrecy—Limitations of.

It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.

The plaintiff was a customer of the defendant bank. A cheque was drawn by another customer of the defendants in favour of the plaintiff, who instead of paying it in to his own account indorsed it to a third person who had an account at another bank. On the return of the cheque to the defendants their manager inquired of the last named bank who the person was to whom it had been paid, and was told it was a bookmaker. That information the defendants disclosed to third persons:—

Held (by Bankes and Atkin L.JJ.), that that disclosure constituted a breach of the defendants' duty to the plaintiff, for though the information was acquired not through the plaintiff's account but through that of the drawer of the cheque, it was acquired by the defendants during the currency of the plaintiff's account and in their character as bankers.

By Scrutton L.J., contra, that although the disclosure was a breach of the defendants' duty to the drawer, it was not a breach of their duty to the plaintiff.

APPEAL of the plaintiff from a verdict and judgment in favour of the defendants at the trial before Avory J. and a jury.

The plaintiff was a customer of the Moorgate Street branch of the defendants' bank, and in March, 1922, his account was overdrawn to the amount of 9*l.* 8*s.* 6*d.* The defendants pressed him to pay off the overdraft, and in April, 1922, he entered into an arrangement with them to pay off 1*l.* a week commencing on April 17. He paid three instalments, and then ceased to make any further payments. On June 8, 1922, he entered the service of a company called Kenyon & Co. under an agreement for a three months' employment as traveller and

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salesman. Shortly afterwards a cheque for 45*l.* was drawn in his favour by a company called Woldingham Traders, Ld., who were also customers of the same branch of the defendants' bank, but the plaintiff did not pay that cheque into his account. The cheque was eventually returned to the defendants for payment by the London City and Midland Bank. The manager of the defendants' Moorgate Street branch, a Mr. Fennell, then inquired of the London City and Midland Bank who their customer was for whom payment of the cheque had been collected, and was told he was a bookmaker of the name of Lloyd. Mr. Fennell then rang up Kenyon & Co. on the telephone and had a conversation with two directors of that company, a Mr. Wells and a Mr. Kenyon. He asked for the plaintiff's private address, and told them that the plaintiff was indebted to the bank, and that though several letters had been written to him he had not replied. Mr. Fennell, according to his own evidence, added: "Tournier must be getting money from somewhere or other; I have seen a cheque coming through the bank payable to Tournier and have been informed that one cheque has gone to the credit of a bookmaker's account, and if that is the case he ought to pay the bank off some of his debt." In consequence of that communication Kenyon & Co. refused to renew the plaintiff's employment when the three months' agreement expired.

The plaintiff brought this action (1.) for slander, and (2.) for breach of an implied contract that the defendants would not disclose to third persons the state of the plaintiff's account or any transactions relating thereto. The slander alleged was twofold: it was alleged in para. 2 that Mr. Fennell said over the telephone to Mr. Wells, "I am afraid that Mr. Tournier is engaged with bookmakers, as we have been able to trace a cheque or cheques passing from Mr. Tournier's account to bookmakers"; and in para. 3 that he said to the other director, Mr. Kenyon, "Tournier's account is overdrawn, and various promises made by him to give the matter his attention have not been fulfilled, cheques passed through Tournier's account were for betting men, and we think that

Tournier is betting heavily"; the innuendo being that the plaintiff was an undesirable person to be employed by Kenyon & Co. and a person not fit to conduct their business or to be entrusted with money. At the trial the actual words proved in evidence were slightly different from those above set out in the statement of claim, and also from the evidence of Mr. Fennell. According to Mr. Wells' evidence the words spoken to him were, "As we have been able to trace a cheque or cheques to a bookmaker we are afraid he is mixed up with bookmakers." Mr. Kenyon said that the words spoken to him were, "He has made various promises to look into the matter and has not done so, and various cheques going through Tournier's account were going to betting men." On the second head of claim, that for breach of an implied contract of secrecy, the obligation claimed was alleged to be an absolute obligation unqualified by any exceptions. It appeared that in the pass books issued by the defendants to their customers, including the pass book of the plaintiff, there was on the first page a statement that "The officers of the Bank are bound to secrecy as regards the transactions of its customers."

Avory J. left the following questions to the jury:—

1. Were the words complained of in para. 2 or para 3 of the statement of claim spoken by Mr. Fennell? Answer No. The plaintiff's counsel had asked the judge to add to the question the words, "or words to the like effect," but the judge had refused.

2. If so, were such words defamatory of the plaintiff, that is, were they calculated to expose him to hatred, ridicule, or contempt in the mind of a reasonable man? Answer No.

3. Has the plaintiff suffered actual damage by the speaking of such words? Answer No. On this head the evidence was that business was not brisk and that Kenyon & Co. would probably have declined to renew the plaintiff's employment in any case.

4. Was Mr. Fennell actuated by malice in speaking the words, that is, was he acting from any indirect motive other than a desire to do his duty? Answer No.

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5. Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion? Answer Yes.

6. What damages? None.

Judgment was thereupon entered for the defendants.

The plaintiffs appealed.

Sir H. Smith K.C. and *Pitt* for the appellant. The summing up of the learned judge was defective on both heads of the claim. On the claim for slander he omitted to ask the jury whether the words proved to have been spoken by Fennell were the same in substance as those pleaded in paras. 2 and 3 of the statement of claim, and though in actions for slander it was formerly essential to prove the actual words pleaded, that strict rule has been relaxed, and "for a long time it has been held to be enough to prove the substance of the words alleged in the declaration": per Lord Coleridge C.J. in *Harris* v. *Warre*. (1) He refused to ask the jury whether "words to the like effect" had been spoken by Fennell, although in *Dalgleish* v. *Lowther* (2) an interrogatory administered to the defendant in an action of slander asking whether he had spoken the words set out in the statement of claim "or words to that effect" was held by the Court of Appeal to be a proper interrogatory. On the claim for breach of the implied contract of secrecy also the summing up was defective, as the learned judge asked the jury the question whether the communication with regard to the plaintiff's account was made "on a reasonable and proper occasion," without giving them any direction as to the circumstances in which the occasion would be reasonable or proper. In *Hardy* v. *Veasey* (3) where the plaintiff, a customer of the defendants' bank, alleged in his amended declaration that the defendants had communicated the state of his account to a third person in breach of their implied promise not to disclose it "except on a reasonable and proper occasion," it is true that no direction was given by the trial judge as to

(1) (1879) 4 C. P. D. 125, 128. (2) [1899] 2 Q. B. 590.
(3) (1868) L. R. 3 Ex. 107.

what constituted a reasonable and proper occasion, and no objection was taken by the Court to that omission. But it was not necessary to do so. The plaintiff had overdrawn his account, and the third person to whom the defendants mentioned the fact was a moneylender from whom they tried to obtain assistance for the plaintiff, and the only question left to the jury was whether the communication to the moneylender was officious and unjustifiable, the judge telling them that if it was made with an honest intention of getting such assistance he doubted whether the action was maintainable. The jury having found for the defendants, the only objection taken to the summing up was that the latter statement was a misdirection. The Court held that it was not.

J. G. Hurst K.C. and *Morle* for the respondents. On the claim for slander the judge was right in refusing to add to the question left to the jury the words "or words to the like effect." "In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used *those* defamatory expressions alleged, which is the fact on which the case depends": per Lord Coleridge C.J. in *Harris* v. *Warre*. (1) In that case a statement of claim, which alleged that the defendant had written letters to the chief constable charging the plaintiff with having been concerned in a murder, without setting out the actual contents of the letters, was held bad on demurrer. That case is quite consistent with *Dalgleish* v. *Lowther*. (2) In exhibiting interrogatories a plaintiff may ask: "Did you use [specific words] or words to that effect?" But a very different and much more strict standard is to be applied when it is a matter of correspondence between pleadings and proof. If the plaintiff's counsel intended to treat the words proved to have been spoken by Fennell as material he ought to have asked for an amendment of the claim, but he did not. In *Ecklin* v. *Little* (3) the words alleged in the statement of claim were: "I hear the plaintiff is a divorced man; you

(1) 4 C. P. D. 125, 128. (2) [1899] 2 Q. B. 590.
(3) (1890) 6 Times L. R. 366.

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had better inquire." The words proved in evidence were such that the jury might infer that the defendant was asserting as a fact that the plaintiff had been divorced, and not merely that she had heard a rumour to that effect from third persons. Under those circumstances the Court held that the plaintiff could not rely on the words proved without an amendment.

With regard to the second head of the plaintiff's claim that there was a breach of the implied contract of secrecy it is to be observed that it has never yet been decided that the duty not to disclose the state of the customer's account is anything more than a moral one. In *Hardy* v. *Veasey* (1) the Court expressly said that it was not necessary for them to decide whether there was a contract or legal duty not to disclose; their decision was nothing more than that, if there was such a duty except on a reasonable and proper occasion, the circumstances of the case brought it within the exception. It is clear that a banker is compellable to disclose the state of the customer's account if ordered to do so by a judge: *Loyd* v. *Freshfield.* (2) It also seems clear that there are other exceptions than compulsion of law. In *Tassell* v. *Cooper* (3), a count which alleged that the plaintiff was a customer of the defendant bank and that it became the duty of the defendants not to disclose the particulars of the plaintiff's account without his authority except to persons presenting for payment cheques or bills drawn or accepted by the plaintiff, "unless compellable by due course of law so to do," was held bad. In *Foster* v. *Bank of London* (4) the holder of a bill of exchange for 532*l.* accepted by the plaintiff payable at the defendants' bank on presenting it for payment was told that the plaintiff's balance was not sufficient to meet it by 104*l.*, whereupon the holder paid in 104*l.* to the plaintiff's account and obtained payment of the bill. In an action against the bank for disclosing the state of the plaintiff's account Erle C.J. left it as a question of fact to the jury whether there was such a duty, and the

(1) L. R. 3 Ex. 107.
(2) (1826) 2 C. & P. 325.
(3) (1850) 9 C. B. 509.
(4) (1862) 3 F. & F. 214.

jury, having found that there was, gave the plaintiff a verdict for the amount at which his balance stood before the 104*l.* was paid in, apparently upon the ground that the act of the banker was in fraud of the plaintiff's other creditors: see per Martin B. in *Hardy* v. *Veasey*. (1) In the present case the plaintiff alleged the banker's duty of non-disclosure to be not merely a legal duty, but an absolute one without exceptions. All that Avory J. was called upon to do was to rule whether the duty as pleaded existed, and he was right in ruling that it did not. But even if the duty of non-disclosure is a legal duty, it is subject to the exception that the banker may do what is necessary for the protection of his own interests. Here the defendants were in the position of creditors trying to recover the balance of an overdraft. The state of the plaintiff's account was a matter in which they were interested. Their communication of it was on a privileged occasion, and there was no evidence of malice. The intimation that the plaintiff had been dealing with bookmakers was not a breach of the duty of non-disclosure at all, for it was based on facts which had no connection with his account, but which they had learnt from another source.

Cur. adv. vult.

Dec. 17. The following written judgments were delivered:—

BANKES L.J. In this appeal the plaintiff asks for a new trial on the ground of misdirection by the learned judge. The action was founded on statements alleged to have been made by an acting manager of a branch of the defendant bank. The plaintiff complained that the statements were slanderous, and further that they constituted a breach of the duty owed by the bank to him. The short facts leading up to the action were as follows: The plaintiff was a customer of the Finsbury Pavement branch of the defendant bank. In April, 1922, his account was overdrawn to a small amount, and on April 8 the plaintiff signed a document agreeing to pay off the debt by weekly instalments of 1*l.*

(1) L. R. 3 Ex. 107.

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At the time this document was signed the plaintiff was about to enter the employ of a firm of Kenyon & Co., and on the document containing the agreement the plaintiff wrote their name and address. The plaintiff did not pay the weekly instalments as agreed. In July the acting manager of the branch, by name Fennell, got into telephonic communication with Kenyon & Co. for the purpose of ascertaining the plaintiff's private address. The inquiry led to further conversation with two directors of the company, one of the name of Wells, and the other of the name of Kenyon. The plaintiff's complaint in the action was that in the course of that conversation on the telephone Fennell had told Kenyon that the plaintiff's account was overdrawn, that various promises made by him to give the matter his attention had not been fulfilled, that cheques which passed through his account were for betting men, and that the bank thought that he was betting heavily. To Wells Fennell was alleged to have said that he was afraid that the plaintiff was engaged with bookmakers, as the bank had been able to trace a cheque or cheques passing from the plaintiff's account to bookmakers. The innuendo pleaded was that the words complained of meant and were understood to mean that the plaintiff was an undesirable person to be employed by Messrs. Kenyon & Co., and a person not fit to conduct their business or to be entrusted with money. Wells and Kenyon were called as witnesses for the plaintiff, and they deposed to a conversation with Fennell in the terms alleged in the statement of claim. So far therefore as the plaintiff's evidence was concerned there was no necessity for the judge to ask the jury any question other than the one which he did ask them, namely—whether the words complained of were spoken by Fennell. In order to contradict the plaintiff's version of the conversation Fennell was called for the defendants. His account of the conversation was that he rang up Messrs. Kenyon in order to ascertain what the plaintiff's private address was, and whether he was working on salary or commission. He was asked why he made the inquiry, and he then explained that the

plaintiff was indebted to the bank in a small amount, and that he had not replied to letters. He then went on to say that the plaintiff must be getting money from some source or other, that he had seen cheques coming through the bank payable to the plaintiff, and that he had made it his business to find out where one cheque had gone to, and that he had been informed that it had gone to the credit of a bookmaker's account, and that if that was the case he thought that the plaintiff ought to have paid off some of his debt to the bank. It was after and in consequence of this evidence by Fennell that the plaintiff's counsel pressed the learned judge to ask the jury whether the words complained of or words to a like effect had been proved, his object being obviously to obtain a verdict on Fennell's evidence if the jury accepted his version of the conversation in preference to that of Wells and Kenyon. The learned judge refused to adopt this course. The question on this part of the case is whether he was right in so deciding. The strictness of the old rule in reference to variance between proof and pleading in actions of libel and slander has long ago disappeared. It is still necessary to plead the exact language complained of, but proof of language substantially the same as that pleaded is admissible and should be submitted to the jury. Lord Coleridge C.J. states the present rule in *Harris* v. *Warre* (1) as follows: "In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration, but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed. In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used *those* defamatory

(1) 4 C. P. D. 125, 128.

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expressions alleged, which is the fact on which the case depends." There can be no question as to the difference in form between the rival accounts of the conversation. Do they differ in substance ? Every case must depend upon its own circumstances, and no rule can be laid down as to what constitutes a substantial difference. In my opinion there was such a substantial difference between the rival accounts of the conversation that Fennell's version ought not to have been submitted to the jury as proof of the plaintiff's pleaded case without an amendment. Even if that view is not correct I do not think that the learned judge was wrong in refusing to add to his question "or words to the like effect." If Fennell's evidence was to be submitted to the jury at all in proof of the plaintiff's case it should have been done by a series of questions which would have made it quite clear to the jury that when they had to consider whether the words were defamatory they must consider that question in reference only to the version of the conversation which they accepted. I do not take the view that there was any material misdirection by the learned judge on this part of the case ; though had the question depended upon whether the ancient definition of what constitutes a slander is sufficiently wide for a case like the present I should have hesitated before saying that it is. As the other members of the Court think that the order for a new trial should include both branches of the claim I do not differ from them, though I do adhere to my view that an amendment is necessary to enable the plaintiff to do what he attempted unsuccessfully to do at the trial.

The case with regard to the claim for damages for breach of duty raises a very important question, and one on which the learned judge did not, in my opinion, sufficiently direct the jury. The case for the plaintiff as alleged in the statement of claim was that the bank were absolutely pledged to secrecy in regard to the plaintiff's account and business, and all matters incidental thereto, and that it was an implied term of the contract between the plaintiff and the bank that they would not disclose to any one any of the plaintiff's business with the bank or matters arising therefrom, or the nature

or state of his account, or any transactions relating thereto. The learned judge very properly, in my opinion, ruled against the existence of any such absolute contract. The matter might have rested there. It did not do so, however, because in his summing up the learned judge did give a direction to the jury on the law on the point, and asked them a question with regard to it. The question was this: "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?" and his direction on this point was as follows: "Fifthly, I shall have to ask, in view of the other claim for breach of contract, whether the communication of the state of the plaintiff's account at the bank, which was made to his employers, was, under the circumstances, made on a reasonable and proper occasion; that is to say, whether there was a reasonable justification for his making that communication? I shall hold, as a matter of law, that there is no such absolute contract as Sir Harold Smith has contended for between a banker and his customer. He has contended that there is an absolute contract that the banker shall not under any circumstances disclose the state of a customer's account to another person. I hold, as a matter of law, that there is no such absolute contract. But, if the banker has made that disclosure justifiably, that is to say, if, under the circumstances of the particular case, it was reasonable and proper that he should make the communication, then there is no breach of contract on his part." With all respect to the learned judge this is not a sufficient explanation of what is a difficult and hitherto only very partially investigated branch of the law. The judge no doubt took the form of the question from the case of *Hardy* v. *Veasey* (1), in which the judges raised, without deciding them, a number of questions in relation to the duty of banker towards customer not to disclose his affairs, and amongst others the question whether the duty was a legal or only a moral one, and if legal whether it arose out of contract or out of tort. At the present day I think it may be asserted with confidence that the duty is a

(1) L. R. 3 Ex. 107.

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legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits. For this purpose the case of *Hardy* v. *Veasey* (1) is of no assistance. The plaintiff in his amended declaration in that case set out a promise on the part of the bank not to disclose the state of his banking account except "on a reasonable and proper occasion." To this the defendants pleaded a denial, and leave and licence. The disclosure complained of was made to a moneylender, to whom the defendant's manager applied with a view of obtaining assistance for the plaintiff. The learned judge who tried the action stated that the question for the jury would be "Whether the communication to the moneylender of the state of the plaintiff's account was an officious and unjustifiable one?" and he added: "If it was made with reasonable hope and an honest intention of getting assistance for the plaintiff I should doubt whether the action is maintainable." The jury found for the defendants. The discussion in the Court of Exchequer took place upon an application for a new trial, and no decision was given except that there had been no misdirection and no wrong verdict. The plaintiff by his pleading had confined his complaint to a disclosure on some occasion other than a reasonable and proper occasion, and the Chief Baron in his judgment is only referring to the plaintiff's complaint when he uses those words. The question was never raised, whether it was a proper way of ascertaining what the defendants' duty was to ask a question of the jury in that form. Had that question been discussed, I cannot think that the Court would have approved of such a question, partly because it is leaving to the jury a question which is primarily a question for the judge, and partly because it leaves the jury entirely without instruction as to what the circumstances are which they are entitled to take into consideration in arriving at a conclusion as to what is reasonable and what is proper. In my opinion it is necessary in a case like the present to direct the jury what

(1) L. R. 3 Ex. 107.

are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (*a*) Where disclosure is under compulsion by law; (*b*) where there is a duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer. An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell* v. *Stephens* (1), where he speaks of cases where a higher duty than the private duty is involved, as where "danger to the State or public duty may supersede the duty of the agent to his principal." A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorizes a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to. Again the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question, but one vital to this case, is whether the confidence extends to information in reference to the customer and his affairs derived not from the customer's account but from other sources, as, for instance, from the account of another customer of the customer's bank.

It is very necessary to speak with caution on this question upon which there is no authority. I desire therefore to confine my observations to the facts of this particular case.

(1) [1920] A. C. 956, 965.

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The information which the branch manager is said to have disclosed, and which disclosure is said to have constituted a breach of duty, came to the bank in the following manner. A cheque was drawn by a customer of the bank on their Moorgate Street branch in favour of the plaintiff. The cheque was paid in to the account of a customer at the London City and Midland Bank. When the cheque came back to the Moorgate Street branch Mr. Fennell's attention was called to the fact that the plaintiff had not paid the cheque in to his account, and Mr. Fennell then made inquiries of the London City and Midland Bank, the reply to which he is said to have committed a breach of his duty in disclosing. The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same. The case of the banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence. I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank, because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies, because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker. So in the present case Mr. Fennell was put upon inquiry by a cheque drawn in the plaintiff's favour upon a customer's account. He acquired the information which he is said to have divulged in his character as the plaintiff's banker. I use the expression "in the character of banker," because I find that expression

used by Gurney B. in the case of *Davies* v. *Waters* (1), in which the question was raised whether a solicitor had acquired certain information as attorney for a client or as his trustee. In his judgment Gurney B. says this: "But the objection here goes further; for just an hour before the trial, being possessed of the deed, and possessed of it in the character of trustee, he takes it to the consultation, and there, in the character of attorney for the defendant, and for the express purpose of informing the minds of the counsel for the defendants, he reads the deed, and by that means acquires his knowledge of its contents. Can it be doubted that this is a knowledge acquired in the character of professional adviser of the party? If so, it is fit and proper that knowledge so acquired should be held sacred." Rolfe B. did not agree with this view of the facts, but I cite the passage because it introduces what is, I think, a convenient indication of the limits of professional or commercial privilege in relation to non-disclosure. In *Taylor* v. *Blacklow* (2) Vaughan J., in speaking of a violation by a solicitor of the professional privilege, speaks of it as a breach of a great moral duty, and he adds that "the law is never better employed than in enforcing the observance of moral duties." In the present case I think that the information obtained by Mr. Fennell as the result of his inquiry of the London City and Midland Bank was covered by the privilege of the customer, and that the bank are liable for any disclosure of that information which may have caused damage to the plaintiff unless the bank can bring the disclosure of the information so derived under one of the classified qualifications I have already referred to.

It follows from what I have said that in my opinion a direction to the jury in a case such as the present must inform the jury of the nature and limits and qualifications of the duty of the bank as a matter of law, leaving to them only questions for the purpose of ascertaining their view whether the communication complained of was or was not made, and whether it did or did not come within any of the protected occasions to which I have called attention. For these reasons

(1) (1842) 9 M. & W. 608, 613. (2) (1836) 3 Bing. N. C. 235, 249.

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I consider that the appeal must be allowed with costs, the judgment entered for the defendants set aside, and a new trial ordered. The costs of the first trial to abide the event of the new trial.

SCRUTTON L.J. This application for a new trial raises questions of some general importance, though I can understand the jury who answered all questions against the plaintiff not taking a favourable view of his case. He had an account with the defendant bank which, in October, 1921, was overdrawn about 8*l.* He paid nothing in to this account until April, 1922, when, being pressed to pay his debt, he agreed to do so by weekly instalments of a pound. He paid three of these, but not punctually, and in July, 1922, had not paid for some time, his overdraft then being 6*l.* or so. Under these circumstances the bank manager found that cheques made payable to him were being paid to strangers at another bank, instead of being used to discharge his overdraft. He also found that one of these cheques came to the bank from the account of a betting man. He was naturally annoyed, and in endeavouring to obtain the private address of the plaintiff from his employers, he made statements, the exact terms of which were in dispute, about the state of the plaintiff's account, and the cheque coming from a bookmaker's account. On hearing of this the plaintiff brought an action against the bank (1.) for slander, alleging as special damage the loss of his situation, (2.) for breach of contract to keep his account secret. The two causes of action have different histories and arguments relating to them, and I deal with them separately.

As to slander, the plaintiff alleged two conversations, one with Wells, to whom Fennell is alleged to have said: "I am afraid that Mr. Tournier is engaged with bookmakers, as we have been able to trace a cheque or cheques passing from Mr. Tournier's account to bookmakers"; the other with Mr. Kenyon, to whom he is alleged to have said: "Tournier's account is overdrawn, and various promises made by him to give the matter his attention have not been fulfilled, cheques

passed through Tournier's account were for betting men, and we think that Tournier is betting heavily." The witnesses gave evidence substantially as pleaded. The bank manager said he asked the plaintiff's employers for his private address, and whether he was paid by salary or commission, and on being asked why he wanted to know said that the plaintiff was slightly overdrawn, and had not answered the bank's letters, and as the manager had seen cheques payable to the plaintiff coming through another bank account, and found they came from a bookmaker's account, he thought the plaintiff ought to pay up. It will be seen he alleges that he said nothing about cheques passing from Tournier's account to bookmakers, or that Tournier was betting heavily; he did mention the overdraft, and that one cheque payable to Tournier had passed through a bookmaker's account. No application was made by the plaintiff to amend by relying on the words proved by the defendants, but when the judge proposed to ask the jury the question: "Were the words complained of in paragraph 2, or paragraph 3 of the claim, spoken by Mr. Fennell?" counsel asked him to add "or words to the like effect," which the judge refused. The jury found that the words alleged in the claim were not spoken. They went on to find that they, presumably the words alleged, were not defamatory. On this the judge had directed them that defamatory words were words tending to expose the plaintiff to "hatred, ridicule, and contempt" in the mind of a reasonable man. I do not myself think this ancient formula is sufficient in all cases, for words may damage the reputation of a man as a business man, which no one would connect with hatred, ridicule, or contempt. This misdirection is, however, not raised by the notice of appeal. The jury appear to have thought that to say that a man's account was overdrawn, and that he betted, was no reasonable cause for "hatred, ridicule, and contempt"; whether they would have thought such words damaging to the reputation of a business man I do not know. The more substantial matter is the refusal of the judge to add the words "to the like effect," and his failure to direct the jury that they should

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consider whether the words alleged, or a material and defamatory part of them, were in substance uttered. There is no doubt that precise words must be alleged in the statement of claim, and only a century ago the most minute variation in proof was ground for non-suiting the plaintiff. One who complained of the words: "This is my umbrella, and he stole it from my back door," and proved: "It is my umbrella, and he stole it from my back door" was non-suited in 1819 by the full Court: *Walters* v. *Mace* (1), it being proved that the umbrella was not in the presence of the speaker, so that "This" referred to a present umbrella, and "It" to an absent one, a different thing. But I think modern practice is, as stated by Lord Coleridge in *Harris* v. *Warre* (2), that it is enough to prove the substance of the words alleged, or I would add, of a material and defamatory part of them. In the case of interrogatories the Court has decided that the defendant may be asked whether he spoke the words "or words to that effect," meaning, according to Sir Francis Jeune, "anything in substance like them," "words which, though not exactly the same, are to that effect." (3) So far as the words proved make a materially different allegation, amendment is necessary if that allegation is to be relied on; but in my view the jury should be directed that if they think the defendant used, in substance, the words, or a material and defamatory part of the words complained of, they should say so, and he is liable. I have no doubt that in this case part of the words alleged are materially different from the defendant's admission, but I think the jury should have been directed to consider whether or not part of the defendant's admission was a material and defamatory part of the words complained of. It is obvious, however, that if the claim for slander stood alone the statement about overdraft was justified, and the jury obviously did not think, and might reasonably not think, the statement about one cheque from a bookmaker's account defamatory. On this part of the case, if it stood alone, I should not be disposed

(1) (1819) 2 B. & Al. 756.
(2) 4 C. P. D. 125.
(3) *Dalgleish* v. *Lowther* [1899] 2 Q. B. 590.

to order a new trial, though I think the summing up was defective.

The other cause of action is of far more public interest. The plaintiff alleged an absolute contract to be implied that the bank should not disclose the plaintiff's account or matters arising therefrom, or any transactions relating thereto, to anybody. The judge directed the jury there was no such absolute contract, and I think he was right. There is clearly no privilege to abstain from answering in a Court of justice questions as to a customer's account: *Loyd* v. *Freshfield* (1), per Abbott C.J.; and the bank can disclose the state of the account by bringing an action to recover overdraft.

The learned judge left to the jury the question: "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?" I think he took these words from the judgments of Kelly C.B. and Martin B. in *Hardy* v. *Veasey* (2), though in that case the actual question left to the jury was: Was the communication "an officious and unjustifiable one?" But having read them the questions, the learned judge, by some unfortunate oversight, omitted to give the jury any direction as to the standard by which reasonableness and propriety were to be considered; indeed, as the jury had found that the words alleged by the plaintiff were not uttered, it is not clear to what communication the question and answer related.

It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion. As to bankers, there is the ruling of Abbott C.J., already referred to, as to the duty to disclose in the law Courts; there is the opinion of two judges on demurrer in *Tassell* v. *Cooper* (3) in 1850, that a count that a bank had a duty not to disclose the state of a customer's account showed no cause of action; but here counsel, who was winning on another count,

(1) 2 C. & P. 325, 329. (2) L. R. 3 Ex. 107.
(3) 9 C. B. 509.

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abandoned the count attacked (1); there is the fact that in 1862, in *Foster* v. *Bank of London* (2), Erle C.J. asked the jury whether it was the duty of the bank not to disclose to a person presenting a bill or cheque the exact state of a customer's account as contrasted with a statement of "not sufficient assets," and on their replying that the duty was as stated said "he knew of no law against that"; and lastly, the judgment in 1868 in *Hardy* v. *Veasey* (3) of the Court of Exchequer, that if there was a duty not to disclose the state of a customer's account it was subject to an exception in favour of disclosure reasonable and proper in the interests of the customer himself. It is to be noticed that in the last case the Court were under the impression that there was no reported case in which an action had been brought against a solicitor for disclosure of his client's affairs; they had not been referred to *Taylor* v. *Blacklow* (4), an action for such disclosure, where all the judges recognized such a duty, tracing it back to a passage in Comyn's Digest, tit. "Action on the Case for Deceit," A.5. (5) It might be possible to rest the duty on the express words in the bank's pass book: "The officers of the bank are bound to secrecy as regards the affairs of its customers," though even then exceptions must be introduced by implication. The contract is alleged in the claim as "implied," and according to the decision of this Court in *In re Comptoir Commercial Anversois and Power* (6), implied terms are a question of law for the Court, the jury finding such facts as are necessary or material to enable the Court to judge of the implication. The Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty

(1) 9 C. B. 532.
(2) 3 F. & F. 214.
(3) L. R. 3 Ex. 107.
(4) 3 Bing. N. C. 235.
(5) 3 Bing. N. C. 248, 249.
(6) [1920] 1 K. B. 868.

equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient. The circumstances in which disclosure is allowed are sometimes difficult to state, especially in the case of a medical man; and I do not propose to do more than indicate the exceptions material to the present case. I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on the business of the account, as in giving a reason for declining to honour cheques drawn or bills accepted by the customer, when there are insufficient assets; or when ordered to answer questions in the law Courts; or to prevent frauds or crimes. I doubt whether it is sufficient excuse for disclosure, in the absence of the customer's consent, that it was in the interests of the customer, where the customer can be consulted in reasonable time and his consent or dissent obtained. I think also, in accordance with well-known authorities on the duties and privileges of legal advisers, that the implied legal duty towards the customer to keep secret his affairs does not apply to knowledge which the bank acquires before the relation of banker and customer was in contemplation, or after it ceased; or to knowledge derived from other sources during the continuance of the relation. For instance, the banker hears from an entirely independent source that one of its customers has speculative dealings in oil, may it disclose that fact to another of its customers also interested in oil? As we have only to imply terms which the parties must necessarily have contemplated, how can it be said that it is a necessary term that the bank shall not talk about the customer at all, though the subject matter of its conversation is not derived from its dealings with the customer? This position would be the same as prevails in the case of legal advisers, as stated in Taylor on Evidence (1), and supported by the cases of *Brown* v. *Foster* (2); *Griffith* v. *Davies* (3), as to which see per Alderson B.

(1) 11th ed., § 930, heads 2 to 5. (2) (1857) 26 L. J. (Ex.) 249.
(3) (1833) 5 B. & Ad. 502.

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in *Davies* v. *Waters* (1); *Lewis* v. *Pennington*. (2) It appears to me, therefore, that we cannot imply an obligation to keep secret information about a customer derived not from that customer or his account, but from the account of another customer. The second customer may complain, but not the first. It is not possible to apply this rule to the facts of the present case so as to avoid a new trial, for we do not know what words were spoken, or how any statement about cheques for betting was mixed up with statements about overdraft. I hold therefore that if the bank knows something about customer A., through customer B.'s account, his duty not to disclose is one owing to customer B. and not to customer A.

None of these matters, or standards by which the propriety of disclosure should be judged, were explained to the jury, and it is obvious that some of them were very material to the facts of this case. What, if anything, was known or suspected about betting was known through the account of another customer, but the suggestion, if made, that the overdraft was due to betting, might be considered by the jury as the disclosure of the plaintiff's account, or might not. I think a new trial should be ordered of this issue, which is an important one; and as the treatment of the issue as to slander was not very satisfactory, I think the new trial should extend to the whole action, and I therefore do not comment further on the facts of the case. The plaintiff must have the costs of the appeal, and those of the first hearing should abide the event of the second hearing. The plaintiff must consider whether he should apply to amend.

ATKIN L.J. This is an action brought by the plaintiff against the defendant bank in respect of words spoken by the manager of a branch of the bank. The plaintiff alleges as causes of action: (A) slander; (B) breach of an implied contract not to divulge information concerning the plaintiff's transactions with the bank. The second point involves a question of considerable public importance, and I propose to consider it first.

(1) 9 M. & W. 608, 611.

(2) (1860) 29 L. J. (Ch.) 670.

In *Joachimson* v. *Swiss Bank Corporation* (1) this Court had to consider what were the terms of the contract made between banker and customer in the ordinary course of business when a current account is opened by the bank. All the members of the Court were of opinion that the contract included several implied terms, some of which were then stated, so far as was necessary for the determination of that case, which turned upon the necessity of a demand before the customer could sue the bank for the amount of his credit balance. It is now necessary to consider whether there is any, and if so what, implied term as to an obligation of secrecy on the part of the bank. The question of what terms are to be implied in a contract is a question of law: *In re Comptoir Commercial Anversois and Power* (2); and the rules by which the Court should be guided are contained in passages from the judgments of Lord Esher in *Hamlyn* v. *Wood* (3), and of Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (4), cited by Bankes L.J. (5) The principle is stated by Scrutton L.J. in words substantially to the same effect (6): "The Court," he says, "and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted." Is there any term as to secrecy to be implied from the relation of banker and customer? I have myself no doubt that there is. Assuming that the test is rather stricter than Lord Watson would require, and is not merely what the parties, as fair and reasonable men, would presumably have agreed upon, but what the Court considers they must necessarily

(1) [1921] 3 K. B. 110.
(2) [1920] 1 K. B. 868.
(3) [1891] 2 Q. B. 488.
(4) (1881) 6 App. Cas. 38.
(5) [1920] 1 K. B. at pp. 886–7.
(6) Ibid. at pp. 899–900.

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have agreed upon, it appears to me that some term as to secrecy must be implied. The bank find it necessary to bind their servants to secrecy; they communicate this fact to all their customers in their pass-book, and I am satisfied that if they had been asked whether they were under an obligation as to secrecy by a prospective customer, without hesitation they would say yes. The facts in this case as to the course of business of this bank do not appear to be in any degree unusual in general banking business. I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent. I am confirmed in this conclusion by the admission of counsel for the bank that they do, in fact, consider themselves under a legal obligation to maintain secrecy. Such an obligation could only arise under a contractual term.

The important point, and one which presents difficulties, is as to the extent of the obligation. The plaintiff's pleading alleged the obligation in wide terms as absolute and unconditional. The learned judge, as I think quite rightly, ruled that there was no such absolute duty, and the trial then proceeded without further amendment of the pleadings on the footing that the plaintiff relied on a breach of the true contract, whatever it was. The learned judge directed the jury: "If the banker has made the disclosure justifiably, that is to say, if, under the circumstances of the particular case, it was reasonable and proper that he should make the communication, then there is no breach of contract on his part." Without any further direction he left to the jury the question: "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?" The direction and question appear to follow the direction to the jury given by Byles J. in *Hardy* v. *Veasey* (1), affirmed by the Court of Exchequer. I think that the decision in that case was based on the fact that the formula approved was that adopted by the plaintiff's counsel

(1) L. R. 3 Ex. 107.

in his pleading, and accepted by him as representing the true issue to be left to the jury. In fact, however, to leave to the jury what is "justifiable" or "proper" is merely to tell them that the bank may not divulge information except on occasions when they may divulge it, and that of what those occasions are the jury are the judges. This appears to me to treat as fact what is matter of law, and to afford no guidance to the jury, leaving the rights and duties as between customer and banker to vary with the individual views of juries in each case.

The first question is: To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, that is, whether there is a debit or a credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account, and to the securities, if any, given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account. It seems to me inconceivable that either party would contemplate that once the customer had closed his account the bank was to be at liberty to divulge as it pleased the particular transactions which it had conducted for the customer while he was such. I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers—for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers. Here, again, counsel for the bank admitted that the bank treated themselves as under such an obligation, and this, I think, would be in accordance with ordinary banking practice. In this case, however, I should not extend the obligation to information as to the customer obtained after he had ceased to be customer. Speaking for myself, I find little assistance from considering the implications that have been found by the Courts to arise from contracts in other occupations and

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professions, such as those of solicitors or doctors. The limitation of the implied term must vary with the special circumstances peculiar to each class of occupation. On the other hand, it seems to me clear that there must be important limitations upon the obligation of the bank not to divulge such information as I have mentioned. It is plain that there is no privilege from disclosure enforced in the course of legal proceedings. But the bank is entitled to secure itself in respect of liabilities it incurs to the customer, or the customer to it, and in respect of liabilities to third parties in respect of the transactions it conducts for or with the customer. It is difficult to hit upon a formula which will define the maximum of the obligation which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer, or for protecting the bank, or persons interested, or the public, against fraud or crime. I have already stated the obligation as an obligation not to disclose without the customer's consent. It is an implied term, and may, therefore, be varied by express agreement. In any case the consent may be express or implied, and to the extent to which it is given the bank will be justified in acting. A common example of such consent would be where a customer gives a banker's reference. The extent to which he authorizes information to be given on such a reference must be a question to be determined on the facts of each case. I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers, except to say it appears to me that if it is justified it must be upon the basis of an implied consent of the customer.

As to the rest of the case based on slander, I think that this issue must also be submitted for a new trial. I do not

think that it is a sufficient direction to a jury on what is meant by "defamatory" to say, without more, that it means: Were the words calculated to expose the plaintiff to hatred, ridicule, or contempt, in the mind of a reasonable man? The formula is well known to lawyers, but it is obvious that suggestions might be made very injurious to a man's character in business which would not, in the ordinary sense, excite either hate, ridicule, or contempt—for example, an imputation of a clever fraud which, however much to be condemned morally and legally, might yet not excite what a member of a jury might understand as hatred, or contempt. Speaking for myself, I also think that it is undesirable where an issue of privilege is raised to leave a question of express malice to be decided by the jury before the judge has ruled whether the occasion is privileged. The judge has to determine, not only whether the occasion is privileged, but whether the defendant has gone beyond the privilege which the occasion creates: *Adam* v. *Ward*. (1) In the words of Lord Loreburn: "All this is for the judge alone, and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege." In many cases, and I think this is one, the jury cannot form a correct opinion as to what is express malice until the judge has ruled whether the circumstances exist, as to legal or social duty and so forth, on which the legal privilege depends; and if the occasion is not privileged, or has been, in fact, exceeded, the question of express malice is irrelevant; and I think it is a disadvantage to the administration of justice that questions should be asked of the jury unnecessarily when the final decision may appear to conflict with their answers. It is also, I think, clear that the plaintiff was entitled to put before the jury his case that the words proved, though not the very words pleaded, were words substantially to the same effect. Whether this be done by amending the pleading, by framing the question to the jury so as to raise the point, or by directing the jury that the words pleaded would be proved by proof of words substantially to the same

(1) [1917] A. C. 309, 321.

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effect, seems to me immaterial. No slander of any complexity could ever be proved if the ipsissima verba of the pleading had to be established. There appears to me to be ample authority in well established every day practice, and in the decisions upon the form of interrogatories in such cases, to support the view that I am expressing.

For the above reasons, without expressing an opinion upon the points raised between the parties at the trial, I come to the opinion that this appeal must be allowed, and a new trial ordered.

Appeal allowed.

Solicitor for the appellant: *J. R. Cort Bathurst.*
Solicitors for the respondents: *Wilde, Wigston & Sapte.*

J. F. C.

1923
Dec. 14, 21.

PRATT *v.* PATRICK AND OTHERS.

[1923. P. 2588.]

Negligence—Motor Car—Negligent driving by Friend of Owner—Retention of Control by Owner—Owner's Liability for Injury caused to third Person in Car.

The defendant was in his motor car, with him, on his invitation, being two friends E. and P. E. drove the car and, owing to his negligence, it collided with another vehicle, and P. sustained injuries from which he died. P.'s widow sued the defendant under Lord Campbell's Act for damages:—

Held, that as the defendant was in the car, and there was no evidence that he had abandoned his right of control, he was liable notwithstanding that by a casual delegation he had entrusted its actual physical management and mechanical control to E.

Samson v. *Aitchison* [1912] A. C. 844 applied.

FURTHER consideration by Acton J. of action tried at Birmingham Assizes.

The plaintiff sued under Lord Campbell's Act on behalf of herself and her four infant children for damages resulting from the death of her husband in the following circumstances: On May 17, 1923, the defendant Patrick was being driven in

his motor car by his friend, a man named Essex, they being accompanied by Pratt, the deceased husband of the plaintiff. Both Essex and Pratt were in the car by the defendant Patrick's invitation as acquaintances of his. Patrick, although he had on a few occasions driven the car, was not in the habit of doing so. On the day in question he sat next to Essex, who drove, while Pratt was in the back seat. Essex had on previous occasions driven the car for Patrick. There was no evidence that on the day in question Patrick had done anything to exclude his right of control of the car. Owing, as the judge found, to the negligence of Essex, the car collided with a motor lorry belonging to the firm of Sessions & Co., who were also made defendants to the action, but who were dismissed therefrom, the judge holding that there was no evidence of negligence against their driver. In the collision Pratt received injuries of so serious a nature that he died.

J. G. Hurst K.C. and *John Wylie* for the plaintiff. Although the deceased man Pratt was being gratuitously carried in the car, the defendant Patrick was under a duty to exercise reasonable care to carry him safely: *Reg.* v. *Jones* (1); *Harris* v. *Perry & Co.* (2) The defendant failed in that duty in that he, or Essex, for whom he was responsible, was negligent in driving the car. The defendant would clearly be liable if Essex had been his servant. In *Chandler* v. *Broughton* (3) Bayley B. said that "if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master": see also *Booth* v. *Mister* (4) and *Wheatley* v. *Patrick.* (5) Essex was not, it is true, the servant of the defendant Patrick, but this circumstance is immaterial seeing that the defendant was himself in the car and had done nothing to exclude his right of control. This precise point was decided by the Privy Council in *Samson* v. *Aitchison.* (6)

(1) (1870) 22 L. T. 217.
(2) [1903] 2 K. B. 219.
(3) (1832) 1 Cr. & M. 29, 30.
(4) (1835) 7 C. & P. 66.
(5) (1837) 2 M. & W. 650.
(6) [1912] A. C. 844.

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[They also cited *Reichardt* v. *Shard.* (1)]

Lauriston Batten K.C. and *J. F. Eales* for the defendant Patrick. The question is whether the defendant is responsible for the negligence of Essex? The answer to that depends upon the further question, who was in fact in control of the car? The Privy Council in *Samson* v. *Aitchison* (2) decided that in the absence of proof that the owner of a car, who is being driven in it, has abandoned the right of control, he is liable as principal for damage caused by the negligence of the person actually driving. In this case the defendant gave up the management of the car; he took no part in driving, and did not interfere in any way; and in those circumstances it cannot be said that the negligence of Essex was the negligence of the defendant.

Cur. adv. vult.

Dec. 21. ACTON J. read his judgment, which, after stating the facts, continued as follows: The legal questions for decision upon the facts are as follows: (1.) What was the duty, if any, owed by the defendant Patrick to the deceased Pratt in the circumstances of this case? and (2.) Was the collision and, by consequence, the death of Pratt caused by the breach or neglect of any such duty committed by Patrick, or for which Patrick was responsible?

The answer to the first question appears to be supplied by *Harris* v. *Perry & Co.* (3), where Collins M.R. said (4): "I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted

(1) (1913–1914) 30 Times L. R. 81; 31 Times L. R. 24.
(2) [1912] A. C. 844.
(3) [1903] 2 K. B. 219.
(4) Ibid. 226.

in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation: see in the case of goods, *Southcote's Case* (1), cited in *Coggs* v. *Bernard* (2), and the notes thereto. In the case of persons received for carriage, Parke B. says in *Lygo* v. *Newbold* (3): 'A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care.' In *Austin* v. *Great Western Ry. Co.* (4) Blackburn J. says: 'I think that what was said in the case of *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (5) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely.' It seems to me that these authorities imply a larger obligation than that of merely not setting a trap: see also, per Baggallay L.J., *Foulkes* v. *Metropolitan District Ry. Co.* (6)"

In the present case, however, the car was being driven not by the defendant Patrick nor by any servant of his in the ordinary acceptation of that term, but with the knowledge and consent of Patrick by Essex, who was in the car just as the deceased Pratt was, to be gratuitously carried in it as a mere licensee by the invitation or permission of Patrick. Can it then be said that Patrick is responsible for the grave negligence in the driving and management of the car of which Essex was guilty? The answer to this question is in my opinion to be found in *Samson* v. *Aitchison.* (7) The headnote to that case is as follows: "Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that

(1) (1601) 4 Rep. 83B.
(2) (1703) 2 Ld. Raym. 909; 1 Sm. L. C., 12th ed., 191.
(3) (1854) 9 Ex. 302, 305.
(4) (1867) L. R. 2 Q. B. 442, 445.
(5) (1851) 11 C. B. 655.
(6) (1880) 5 C. P. D. 157, 165.
(7) [1912] A. C. 844.

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right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving." Upon these facts the following passages in the report of the case appear to throw light upon the principle applicable (1): "Chapman and Denniston JJ. were of opinion that where an owner of a vehicle is found to have handed over the actual physical management of it to another person while himself remaining in the vehicle, there is evidence for the jury that the owner is liable for the negligence of the driver; that to get rid of his liability it is essential that the owner should shew that he has parted with the control of the vehicle in the sense of putting himself out of control; and that the defendant had failed to shew that he had so parted with the control; Denniston J. concluding his judgment by saying, 'I think there is no evidence to displace . . . . the inference to be drawn from the fact that at the time of the accident the appellant was in the car and that Collins was then driving the car with the appellant's consent.'" Further Lord Atkinson said (2): "The learned judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: 'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver "Do this" or "Don't do that." The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering-wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at

(1) [1912] A. C. 845. (2) [1912] A. C. 849.

a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne*. (1) The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right to control.' "

In my opinion these authorities show that in the circumstances of the present case Mr. Hurst is right in saying that the principles deducible are (1.) that if the defendant Patrick had been driving, and had driven as Essex drove, he would have been liable to Pratt in an action for damages for injuries sustained by Pratt in the collision, and (2.) that as the defendant Patrick was in the car and in control of it, he is no less liable, because by what has been termed a "casual delegation," he had entrusted the actual physical management of the car and its mechanical control to Essex, whose negligence it was that caused the collision. In addition to *Samson* v. *Aitchison* (2), a number of other cases were cited by Mr. Hurst as illustrative of the principle applied in that case. They were *Booth* v. *Mister* (3); *Chandler* v. *Broughton* (4); *Wheatley* v. *Patrick* (5); *Reg.* v. *Jones* (6); and *Reichardt* v. *Shard*. (7) In my view my judgment must be for the plaintiff against the defendant Patrick.

As to the damages, the evidence was somewhat scanty and vague, and I am of course bound to take into consideration the irregular and precarious character of the deceased man's occupation. Giving the matter the best attention I can, I assess the damages at 800*l*.—namely, 300*l*. to the widow and 125*l*. to each of the young children. There will be judgment accordingly for the plaintiff against the defendant Patrick for 800*l*. and costs, to which costs there is no question

(1) [1907] 1 K. B. 40.
(2) [1912] A. C. 844.
(3) 7 C. & P. 66.
(4) 1 Cr. & M. 29.
(5) 2 M. & W. 650.
(6) 22 L. T. 217.
(7) 30 Times L. R. 81; 31 Times L. R. 24.

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that there are to be added those costs which the plaintiff will become liable to pay to the defendant Patrick's successful co-defendants, Sessions & Co. I direct that the moneys allocated to the children be paid into Court to be dealt with as directed by the Senior District Registrar of Birmingham District Registry.

Judgment for plaintiff.

Solicitors for plaintiff: *J. W. Barton, for Frank B. Darling & Son, Birmingham.*

Solicitors for defendant: *Nash, Field & Co., for Blewitt & Co., Birmingham.*

J. S. H.

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Nov. 26, 27; *Dec.* 20.

SUTTON *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY.

Insurance (Health)—Approved Society—Rules—Power to terminate Membership for "immoral conduct or other serious personal misconduct"—Unmarried Member becoming pregnant—Expulsion of Member from Society—Validity of Rule—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 14, 30—*National Health Insurance Act*, 1918 (7 & 8 *Geo.* 5, *c.* 62), *s.* 12, *sub-s.* 3.

National Insurance Act, 1911, s. 30, sub-s. 2: "An approved society shall be entitled, in accordance with its rules, ... to expel any of its members being insured persons. . . . ."

National Health Insurance Act, 1918, s. 12, sub-s. 3: "Notwithstanding any provision to the contrary in any rule of an approved society or branch of such society, an insured unmarried woman who is pregnant shall not on the ground that her pregnancy was due to misconduct be deprived of any sickness or disablement benefit to which she would but for that provision have been entitled."

An approved society under the National Insurance (Health) Acts made a rule, No. 18 (1.), under which the committee of management had power to terminate the membership of any member for (inter alia) "immoral conduct or other serious personal misconduct," the person so ceasing to be a member being entitled to have his transfer value transferred to any other society he might join. One of the members of the society, who was an unmarried woman, became pregnant, and on this fact becoming known to the society, the committee passed a resolution to terminate her membership of the society on the ground of "immoral conduct or other serious personal misconduct." She appealed against that decision, and the appeal was referred to a referee to hear and determine, who stated a case for the opinion of the Court:—

Held, (1.) that the status of membership was quite separate and

distinct from the right to benefits, and that an approved society was entitled to make a rule to expel a member on the ground of immoral conduct even though the result of the expulsion was to deprive that member of future contingent benefits which she might have received had she remained a member of the society, but that the society could not make a rule which would deprive a member of accrued benefits to which she would but for that provision have been entitled.

(2.) That the referee was not bound by the decision of the committee of management but was entitled to come to his own conclusion on the evidence before him.

(3.) That the provisions of r. 18 (1.) were not ultra vires.

(4.) That the society in the case of expulsion was not bound to do more than hand the transfer value to the appellant or her agent.

(5.) That the onus of proving that the appellant had been deprived of benefits lay upon her and not upon the society.

CASE stated for the opinion of the Court under s. 19 of the Arbitration Act by a referee appointed by the Minister of Health under the National Insurance Act, 1911, to decide an appeal by the appellant against the respondents.

The appellant, Edith Sutton, was for some ten years before March 15, 1923, a member of the respondent society, and before February, 1923, had made no claim upon the society. In the year 1922 the appellant under promise of marriage allowed a man with whom she had been keeping company to have intercourse with her, and as a result of such intercourse she became pregnant. In February, 1923, the appellant claimed sickness benefit from the society and in support thereof furnished a medical certificate, but such claim and certificate were in respect of sickness not connected with her pregnancy. By reason of such claim the appellant was visited by one of the society's sick visitors, and as a consequence of this visit it became known to the society that she was pregnant.

Rule 18 (1.) of the rules of the society provided that "the committee of management may for the reasons hereinafter mentioned terminate the membership of any member at any time. On the termination of membership as herein provided the person so ceasing to be a member shall be entitled to have his transfer value (calculated in accordance with tables to be prepared by the Insurance Commissioners) transferred to any other society which he may join. Such reasons may

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be: wilful and material misstatement or omission upon his application for membership, the making of any fraudulent claim upon the society by malingering or otherwise imposing on the funds of the society, the repeated breach, or serious wilful breach, of the Act or any rule of the society, conviction for felony or other criminal offence, or immoral conduct or other serious personal misconduct. Except for such misconduct no male member shall be expelled, who, by reason of the state of his health, cannot obtain admission into another approved society, and no female member unless the society can prove that she has actually been accepted for membership by another approved society offering equal advantages. Provided that a member shall have at least seven days' notice from the committee of management of their intention to expel such member upon such grounds as aforesaid, and such member may within seven days of the receipt of such notice give notice to the committee of management that he desires to oppose such expulsion, and thereupon the committee of management shall, within three days thereof, give notice to such member of the time and place at which he may attend and state his reasons for opposing such expulsion and calling any proper evidence he may desire, and upon hearing such member and such evidence as aforesaid the committee of management shall determine whether such expulsion shall take place or not, and if the former such member may give notice within three days thereof to the committee of management of his intention to appeal from such decision and thereupon the provisions of r. 37 of these rules shall apply." A copy of the rules of the society was attached to and formed part of the case.

The society on March 6, 1923, gave notice to the appellant of their intention to terminate her membership of the society on the ground of "immoral conduct or other serious personal misconduct."

On March 15, 1923, the appellant attended before a meeting of the committee of management of the society and objected to her expulsion from the society, but the committee by resolution of that date determined the appellant's membership

of the society, and on March 16, 1923, gave the appellant notice of such determination.

The appellant required the dispute, whether she was after the resolution of the society of March 15, 1923, a member of the society, to be referred to arbitration. The dispute was duly referred to arbitration, and the arbitrator on May 25, 1923, published his award in favour of the society. The appellant appealed from that decision, and the appeal was referred to Mr. S. L. Porter as referee to hear and determine, who in the course of the hearing was requested by the society to state a case for the opinion of the High Court.

It was admitted on behalf of the appellant that the rules of the society were adopted in the year 1912 and had not been revised since the passing of the National Health Insurance Act, 1918, and that the appellant was paid the whole of the benefit which she claimed prior to her expulsion, and that such claim was in respect of illness unconnected with her pregnancy, and that benefit in respect of such illness ceased not because of her expulsion but because she made no further claim in respect of such illness.

It was contended before the referee on behalf of the society: (1.) That upon the facts aforesaid the appellant had been guilty of immoral conduct or other serious personal misconduct; (2.) alternatively, that the committee of management of the society could reasonably come to the conclusion that the appellant had been guilty of immoral conduct, and that if they could reasonably come to such conclusion it was not open to the arbitrator or to the referee to interfere with their conclusion.

It was contended on behalf of the appellant that upon the true construction of the rules one single moral lapse was not immoral conduct, and that if such lapse was immoral conduct then the rules of the society, if and so far as they gave a right of expulsion by reason of such lapse, were ultra vires and invalid as being contrary to s. 12, sub-s. 3, of the National Health Insurance Act, 1918, and as enabling the society to avoid paying to the appellant one of the

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benefits to which she would or might have been entitled by reason of her insurance with the society, and that the onus of proving that the appellant was not deprived of such benefits or any of them lay upon the respondents.

The referee found that the appellant might by reason of her expulsion from the society have been deprived of some sickness or disablement or maternity benefit, but that no evidence was given to show whether the appellant was in fact deprived of any such benefit or not. Further, that the committee of management might, so far as it was a question of fact for them, reasonably come to the conclusion that the appellant had been guilty of immoral conduct.

The questions for the opinion of the Court were: (1.) Whether upon the facts aforesaid the referee was obliged in law to hold that the appellant was guilty of immoral conduct or other serious personal misconduct within the meaning of the rules of the society.

(2.) Whether it was open to the referee to hold or find that the appellant had not been so guilty, having regard to the aforesaid decision of the committee of management of the society.

(3.) Whether the provisions of r. 18 (1.) of the rules of the society were ultra vires and invalid in so far as they provide (if they do provide) for the exercise by the society of the right of expulsion by reason of the pregnancy of a single woman due to intercourse with her consent.

(4.) Whether the society by expelling the appellant was entitled to avoid any obligation to pay to the appellant such benefits or any of such benefits as aforesaid to which but for her expulsion she would or might have been entitled.

(5.) Whether the onus of proving that the appellant had been deprived of such benefits lay upon the appellant or upon the respondents.

T. F. Davis for the appellant.

A. S. Comyns Carr for the respondent society.

The arguments are sufficiently stated in the judgment.

Cur. adv. vult.

1923. Dec. 20. The judgment of the Court (Lord Hewart C.J., Sankey and Swift JJ.) was read by

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Sutton v. New Tabernacle Society.

Lord Hewart C.J. This is a case of some public importance which has been stated by a referee under the National Insurance Act, 1911, for the opinion of the Court, under s. 19 of the Arbitration Act.

The facts are comparatively simple. Edith Sutton was a member of the New Tabernacle Approved Society for National Health Insurance. The society is one approved under the National Insurance Act, 1911, and Edith Sutton had from time to time duly paid her subscriptions thereto. She was an unmarried woman, and recently, falling ill, she was visited by a visitor of the society, who found that she was pregnant. The visitor reported the fact to the society, which, after considering her case, exercised its alleged rights under r. 18 and, holding that she had been guilty of immoral conduct or other serious personal misconduct, expelled her from the society.

This case raises the question whether the society was entitled so to do. Before answering the specific questions addressed to us, we think it right to make some general observations in order to render our answers clearer.

It was contended on behalf of Edith Sutton that the rule in question was ultra vires, or, at any rate, was ultra vires in the sense in which the society acted upon it. It was said that it was provided by a subsequent Act of Parliament—namely, the National Health Insurance Act, 1918, s. 12, sub-s. 3, that "notwithstanding any provision to the contrary in any rule of an approved society or branch of such society, an insured unmarried woman who is pregnant shall not on the ground that her pregnancy was due to misconduct be deprived of any sickness or disablement benefit to which she would but for that provision have been entitled," and that, therefore, as the Act of Parliament had said that the pregnancy of an unmarried woman should not deprive her of any sickness or disablement benefit, the society could not have a rule which in effect did so by expelling her, or, alternatively, that the rule could not be so interpreted, and

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that mere pregnancy under such conditions could not be immoral conduct.

On the other hand, it was urged that in approaching a question of this character it was necessary to consider two things quite separately—(1.) the status of membership; and (2.) the right to benefits. As to (1.), a member had rights quite apart from benefits—namely, the right to take a part, directly or indirectly, in the administration of the society. As to (2.), the right to benefits must mean a right to benefits accrued; that if a member were expelled she could not, and did not, lose any benefits within the meaning of the Act of Parliament, because the transfer value of her right would be handed over either to another society or to the Post Office; and that, therefore, in expelling the member the society had not, in fact, deprived her of any benefits to which she was then entitled, and had in no way transgressed the section of the Act of Parliament. It was true, the society urged, that she might not reap contingent benefits, that is to say, the right to come upon the funds of the society later on in respect of any disablement or sickness benefit, but that that was not a loss which was forbidden by the Act.

Now it must be remembered as a cardinal fact that approved societies have the right to expel members: see s. 30 of the Act of 1911, which provides by sub-s. 2 that "an approved society shall be entitled, in accordance with its rules, to admit or reject any such applicant, or to expel any of its members being insured persons: Provided that no such application shall be refused solely on the ground of the age of the applicant." If a society made a rule which could not be challenged, say, for example, a rule to expel any member who became a convicted felon and was sentenced to three months' hard labour, in such a case, although the member expelled might have got his subscriptions paid for him during his imprisonment and so not have been in default, and might under such circumstances have claimed the right to come upon the funds of the society in the future for disablement or sickness pay, yet it is clear that the Act of Parliament allows a rule which would entail the loss of such rights to

such a person. It would, therefore, appear not to be a good argument to say that the rule is ultra vires, or cannot be acted upon in the sense in which the society have acted upon it, because it deprives the applicant in this case of future contingent benefits which she might have received had she remained a member of the society and continued to pay her subscriptions.

The other point is a more formidable one. "How," argues the appellant, "can you make a rule to expel me for doing something as a result of which the Act of Parliament says I am entitled to benefit: in other words, although I am an unmarried mother and about to have a child, and therefore presumably about to be entitled to maternity benefit, how can you say that such conduct by me is immoral conduct and expel me under your rules, and so deprive me of the very benefit which the Act of Parliament says I am to have?" In our view this is a fallacy, and the answer to it is to be found by keeping the two positions above cited—namely (1.) status of member, and (2.) right to benefits—entirely separate. A society may make rules to expel its members, as we think, even on the ground of immoral conduct. A society is entitled to say that it will not have a person guilty of such conduct interested in the management of the society; but it cannot pass a rule, nor, indeed, can it interpret one of its rules in such a way as to say that such a person shall be deprived of rights which the Act of Parliament has conferred upon her. In our view, the society's interpretation of this rule does not deprive her of any such rights. She is, in truth, deprived of membership; she is also deprived of contingent future benefits, of which, as above stated, the Act of Parliament does not appear to deprive her. She is not deprived of any sickness or disablement benefit to which she would, but for that provision, have been entitled. She gets her full transfer rights, but she ceases to have the right to remain a member or to get future contingent benefits.

It is to be borne in mind, however, that the terms "immoral conduct" and "misconduct" are to be interpreted here in rules framed under the National Insurance

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Act, which in cases of maternity is concerned with the welfare not less of the infant than of the mother. Circumstances may greatly vary, and the true question appears to be, upon the facts of each particular case, whether the rule rightly interpreted has been broken, and whether it is right that expulsion should follow.

We will now answer the questions addressed to us :—

(1.) Whether upon the facts aforesaid the referee was obliged in law to hold that the appellant was guilty of immoral conduct or other serious personal misconduct within the meaning of the rules of the said society ? Answer : "No."

(2.) Whether it was open to the referee to hold or find that the appellant had not been so guilty, having regard to the aforesaid decision of the committee of management of the said society ? Answer : "Yes. An arbitrator under rr. 18 and 37 of the society and a referee under s. 67 of the Act of 1911 is not bound by any decision, whether of fact or law, of the committee of management. He is entitled to come to his own conclusions on the evidence before him. Rule 11A (4.) of this society contemplates that unmarried mothers may remain members of the society."

(3.) Whether the provisions of r. 18 (1.) of the rules of the said society were ultra vires and invalid in so far as they provide (if they do provide) for the exercise by the said society of the right of expulsion by reason of the pregnancy of a single woman due to intercourse with her consent ? Answer : "It cannot be said that the provisions of r. 18 (1.) are ultra vires. If the provisions are held to be inconsistent with the provisions of the Act, they are, by r. 1 (3.), to the extent of such inconsistency, void. The provisions are not inconsistent with the Acts."

(4.) Whether the said society by expelling the appellant was entitled to avoid any obligation to pay to the appellant such benefits, or any of such benefits, as aforesaid to which but for her expulsion she would or might have been entitled ? Answer : "This question is best answered by saying that, if the society hands to the appellant or her agent the transfer money, it is not obliged in the case of expulsion to do more."

(5.) Whether the onus of proving that the appellant had been deprived of such benefits lay upon the appellant or upon the respondents? Answer: "The onus lies on the appellant."

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Questions answered.

Solicitors for appellant: *Bulcraig & Davis.*
Solicitors for society: *Kingsley Wood, Williams & Co.*

R. F. S.

THE KING *v.* DEVON JUSTICES.

Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

1923
Dec. 20, 21.

Criminal Law—Jurisdiction—Larceny alleged to have been committed on one of His Majesty's Ships in Scottish Waters—Prisoner arrested in England—Jurisdiction of Quarter Sessions—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 115—*Naval Discipline Act*, 1866 (29 & 30 *Vict. c.* 109), *ss.* 87, 89—*Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 17, 39.

A person on board one of His Majesty's ships, which was then in commission and lying in the tidal waters of the Firth of Forth above the Forth Bridge, was alleged to have committed larceny as a clerk or servant to the Navy, Army and Air Force Institutes. He was placed under arrest by an executive officer of the ship, and, some days later, by which time the vessel had arrived in Torbay, he was apprehended by the Devon police and charged before the justices, who committed him for trial at the Devon Quarter Sessions. The indictment charged an offence contrary to s. 17, sub-s. 1 (*a*), of the Larceny Act, 1916, committed on the high seas. The prisoner was arraigned and pleaded not guilty and a jury was impanneled, but quarter sessions declined to proceed with the indictment upon the ground that s. 115 of the Larceny Act, 1861, which was said to give them jurisdiction, did not extend to offences committed in estuaries or rivers in Scotland, and that the offence charged was properly triable only by the Scottish Courts:—

Held, that quarter sessions had jurisdiction to try the indictment inasmuch as it alleged an offence which, by virtue of the provisions of the Naval Discipline Act, 1866, was committed within the jurisdiction of the Admiralty of England, and, therefore, being an offence mentioned in the Larceny Act, 1861, it was triable, under s. 115 of that Act, in the county where the offender was apprehended.

RULE NISI for a mandamus to the justices for the county of Devon directing them to proceed with the hearing of an

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indictment against one Roderick William Castle, charging him with larceny under s. 17, sub-s. 1 (*a*), of the Larceny Act, 1916. (1)

On October 3, 1923, at the Devon Quarter Sessions a true bill was found in this form: "Roderick William Castle is charged with the following offence:—Statement of offence: Larceny, contrary to s. 17, sub-s. 1 (*a*), of the Larceny Act, 1916. Particulars of offence: Roderick William Castle on July 10, 1923, on the high seas, being clerk or servant to the Navy, Army, and Air Force Institutes, stole from the said Navy, Army, and Air Force Institutes forty pounds in Treasury notes."

The offence charged was alleged to have been committed by Castle on July 10, 1923, on board His Majesty's ship *Princess Margaret*, a ship attached to the Atlantic Fleet, then lying in the tidal waters of the Firth of Forth between Rosyth and Port Edgar, above the Forth Bridge, but at a place where the Forth is about $1\frac{3}{4}$ or 2 miles in width, and where great ships, including the largest in His Majesty's fleet, habitually lie. On July 12 Castle was placed under open arrest by an executive officer of the ship, and on July 17, by which date the ship had arrived in Torbay, Castle was arrested by an officer of the Devon Constabulary and charged before the Torquay justices, who committed him for trial. At quarter sessions Castle was arraigned and pleaded not guilty, and a jury was impanneled, but the Court declined to proceed with the indictment upon the ground that s. 115 of the Larceny Act, 1861 (2), did not extend

(1) Larceny Act, 1916, s. 17: "Every person who (1.) being a clerk or servant or person employed in the capacity of a clerk or servant—(*a*) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer . . . . shall be guilty of felony. . . . ."

(2) Larceny Act, 1861, s. 115: "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence . . . . the venue in the margin shall be the same as if the offence had been committed in such county or

to offences committed in estuaries or rivers in Scotland, and that the offence charged was properly triable only by the Scottish Courts.

This rule was thereupon obtained on the ground that there was jurisdiction in the Devon Quarter Sessions, by virtue of s. 115 of the Larceny Act, 1861, to try Castle.

Travers Humphreys and *Dummett* for the justices showed cause. Sect. 115 of the Larceny Act, 1861, which is said by the prosecution to give the Devon Quarter Sessions jurisdiction to try this indictment, has no relation to any indictment preferred, as this is, under the Larceny Act, 1916. It lies upon the prosecution to show that where an indictment is laid under one Act—here it is laid under the Larceny Act, 1916—the Court can have regard to another statute. Many of the sections of the 1861 Act, including s. 114, have been repealed but re-enacted by the Act of 1916, but s. 115 of the Act has not been repealed or re-enacted, the Legislature allowing it to continue in force in respect of those offences which are still triable under the Act of 1861. But its operation is now limited to those offences, there being no provision in the Act of 1916 that that statute and the Act of 1861 are to be read together. Sect. 39 of the Larceny Act, 1916 (1), would have given the Devon Quarter Sessions jurisdiction to try the prisoner if the indictment had alleged that the offence was committed in the county of Devon. The indictment alleges the offence to have been committed on the high seas, but on the admitted facts it is clear that the alleged offence was committed in the Firth of Forth at a place above

place, and the offence itself shall be averred to have been committed 'on the high seas': provided that nothing herein contained shall alter or affect any of the laws relating to the Government of [His] Majesty's land or naval forces."

(1) Larceny Act, 1916, s. 39, subs. 1: "A person charged with any offence against this Act may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place."

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the Forth Bridge, and which therefore is not the high seas. The Admiralty jurisdiction has never extended above a bridge : 15 Ric. 2, c. 3 ; 28 Hen. 8, c. 15 ; *Reg.* v. *Anderson* (1) ; *Reg.* v. *Carr and Wilson* (2) ; see also *Rex* v. *Allen* (3) ; *Rex* v. *Bruce* (4) ; and *Reg.* v. *Mannion.* (5) If the place where the offence is alleged to have been committed had been within the jurisdiction of the Admiralty of England the prisoner could have been tried at the Central Criminal Court under s. 22 of the Central Criminal Court Act, 1834, or at the assizes under the Admiralty Offences Act, 1844 ; but as the place in question is not within the jurisdiction of the Admiralty, neither of those statutes is applicable. What the prosecution should have done was to proceed either by court-martial or in the Scottish Courts, which undoubtedly would have jurisdiction.

Harold Murphy (*Sir Douglas Hogg A.-G.* and *Giveen* with him) in support of the rule. The place where the offence is alleged to have been committed was within the jurisdiction of the Admiralty of England. The word " bridges " mentioned in the statute of Richard II. must be read as referring to the kind of bridge then known, and not as referring to a gigantic structure like the Forth Bridge, beneath which the largest vessels of the Fleet can and do go. It would indeed be an odd result if one of the great anchorages of the British Fleet, as this place is, were to be held to be outside the jurisdiction of the Admiralty of England. A ship of the Royal Navy in commission, wherever it is, is within the jurisdiction of the Admiralty of England ; it certainly is so as regards all persons on board who are subject to the Naval Discipline Act, 1866. By s. 56 of that Act every offence triable under that Act—larceny is one of those offences : s. 45—may be tried and punished by court-martial ; and those subject to the Act are (1.) every person in or belonging to His Majesty's Navy and borne on the books of one of His Majesty's ships in commission, and (2.) all other persons ordered to be received

(1) (1868) L. R. 1 C. C. R. 161.
(2) (1882) 10 Q. B. D. 76.
(3) (1837) 1 Moo. C. C. 494.
(4) (1812) Russ. & Ry. 243.
(5) (1846) 2 Cox, C. C. 158.

or being passengers on board any of His Majesty's ships: see ss. 87 and 89. The Admiralty could have made regulations for the trial by court-martial of the last-mentioned class. This however has not been done, but by art. 739 of the King's Regulations and Admiralty Instructions it is provided that "if any passenger while on board one of His Majesty's ships shall commit any criminal offence, punishable by the laws of the United Kingdom, he may . . . . be kept under such restraint as is necessary until an opportunity shall offer of delivering him over to a civil tribunal competent to try him for the same." This course was followed in the present case. With regard to s. 115 of the Larceny Act, 1861, it is to be observed that it does not speak, as does s. 39 of the Larceny Act, 1916, of an "offence against this Act," but of "offences mentioned in this Act," and the offence now in question is mentioned in s. 67 of the Act of 1861.

LORD HEWART C.J. This is an order nisi for a mandamus to the justices for the county of Devon directing them to proceed with the hearing of an indictment against one Castle which charged him with larceny under s. 17, sub-s. 1 (*a*), of the Larceny Act, 1916. The ground upon which the rule was obtained was that there was jurisdiction in the Devon Quarter Sessions, by virtue of s. 115 of the Larceny Act, 1861, to try Castle. [His Lordship stated the facts, and continued:] Sect. 115 of the Larceny Act, 1861, has not been repealed and is still of full force and effect, but it was said by counsel showing cause against the rule that that section does not assist the prosecution in the present case inasmuch as the offence charged against Castle is not an offence mentioned in the Act of 1861 and committed within the jurisdiction of the Admiralty of England. It is quite clear that the offence charged is an indictable offence mentioned in the Act of 1861. Is it true to say, in the circumstances, that it was committed within the jurisdiction of the Admiralty of England? The argument before us has gone back to comparatively ancient times, beginning with the statute of 15 Ric. 2, c. 3, but it is not necessary for me to retrace the history of the law; it

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Lord Hewart C.J.

is enough to say that under the Naval Discipline Act, 1866, the offence alleged, which is said to have been committed on board one of His Majesty's ships, was an offence committed within the jurisdiction of the Admiralty of England. The offender was either a naval rating or he was not; if he was, he was obviously subject to the jurisdiction of the Admiralty of England; if he was not, nevertheless by s. 89 of the Naval Discipline Act, 1866, he was still subject to the jurisdiction of the Admiralty of England. In my opinion, therefore, the contention raised on behalf of the prosecution in this case is correct, that Devon Quarter Sessions had jurisdiction to try Castle upon this indictment inasmuch as he was apprehended in Devon. It may well be that a similar result might be reached by reason of s. 39, sub-s. 1, of the Larceny Act, 1916, but it is unnecessary to decide that point. Being satisfied that the contention for the prosecution is correct, I think that this rule must be made absolute.

SANKEY and SWIFT JJ. concurred.

Rule absolute.

Solicitor for rule: *Director of Public Prosecutions.*

Solicitors showing cause: *Ford, Lloyd, Bartlett & Michelmore, for Brian S. Miller, Exeter.*

J. S. H.

LANDRIGAN *v.* SIMONS.

1923
Nov. 22;
Dec. 19.

Landlord and Tenant—Statutory Tenant—Increase of Rent—Sums paid in Excess—Tenant's Right to recover—Retrospective Statute—Rent Restrictions (Notices of Increase) Act, 1923 (13 & 14 *Geo.* 5, *c.* 13), *s.* 1.

By the Rent Restrictions (Notices of Increase) Act, 1923, s. 1, sub-s. 1: "Where notice of intention to increase rent has, whether before or after the passing of this Act, been served on a tenant in conformity with s. 3, sub-s. 2, of the Increase of Rent, &c. Act, 1920, ... and a notice to terminate the tenancy was necessary in order to make such increase effective, the notice of intention to increase the rent shall have effect and shall be deemed always to have had effect as if it were or had been also a notice to terminate the existing tenancy . . . .

"Provided that

"(*a*) Nothing in this Act shall entitle a landlord after the passing of this Act to recover from a tenant, in respect of any period before December 1, 1922, the increase of rent made valid by this Act . . . .; but s. 14, sub-s. 1, of the principal Act shall not apply to an increase of rent made valid by this Act which was paid by, or recovered from, a tenant prior to December 1, 1922;

"(*b*) nothing in this Act shall affect the right to enforce any judgment of a court of competent jurisdiction given before February 15, 1923, or render recoverable any sum paid under such a judgment."

The Rent Restrictions Act, 1920 ("the principal Act"), s. 14, sub-s. 1, enables the tenant to recover from the landlord or to deduct from the rent any sum paid on account of rent which is by virtue of the Act irrecoverable by the landlord.

In January, 1919, the landlord of premises, to which the Rent Restrictions Act, 1920, applied, served on the tenant notice of increase of rent, but failed to serve notice to terminate the tenancy. The tenant paid rent at the increased rate until May, 1923, when she brought an action in the county court to recover the rent paid in excess between those dates. On June 5, 1923, the county court judge gave judgment in her favour for the amount claimed. On June 7, 1923, the above Act came into force, whereupon the landlord appealed:—

Held, that the Act was retrospective, and that the question as to the validity of the notice having been raised in the county court, the Act could be invoked in aid by the landlord on appeal.

Held, also, that the whole of the increases were validated by the Act and that the landlord was entitled to judgment.

Appeal from West London County Court.

The plaintiff was at all material times the tenant and the defendant the landlord of premises known as No. 2, Francis Street, S.W. 6, which came within the scope of the Rent Restrictions Act, 1920.

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In January, 1919, the landlord served upon the tenant notice of increase of rent in accordance with the Act, but did not serve therewith notice to terminate the tenancy. On May 2, 1923, the tenant took out a summons in the West London County Court claiming 26*l.* 18*s.* 11*d.*, sums which, as she alleged, she had paid the landlord in excess of rent. The summons was heard on June 5, 1923, when the county court judge found that no notice to quit had been served on the tenant, as was required according to the decision in *Kerr* v. *Bryde* (1), and gave judgment for the tenant for the amount claimed.

On June 7, 1923, the Rent Restrictions (Notices of Increase) Act, 1923, came into force, and the landlord then appealed, the material ground of appeal being that upon the true construction of s. 1 of that Act (supra) the tenant was not entitled to recover.

Edgar Foà for the landlord. The Rent Restrictions (Notices of Increase) Act, 1923, is clearly retrospective. Sect. 1, sub-s. 1, of the Act validates notices of increase of rent "whether before or after the passing" of the Act, and by sub-s. 1 (*b*) nothing in the Act is to affect judgments given before February 15, 1923."

The point was raised at the trial as to the efficacy of the notice of increase: that is a point of law and is therefore open to argument on appeal within the principle of the County Courts Act, 1888, s. 120, and *Smith* v. *Baker & Sons* (2), although the Rent Restrictions (Notices of Increase) Act, 1923, was not passed until after the judgment in the county court had been delivered. It was held in *Stovin* v. *Farebrass* (3) that the Rent Restrictions Act, 1919, was retrospective and must be considered by the Court of Appeal, although the Act was not passed until after the case was decided in the Court of first instance: see judgment of Bankes L.J.

The Act clearly covers the present case so far as rent

(1) [1923] A. C. 16. (2) [1891] A. C. 325.
(3) (1919) 35 Times L. R. 659, 662.

accrued due up to December 1, 1922, is concerned, directing that payments of rent up to that date are not to be disturbed. It also covers payments since that date. In adding the proviso at the end of s. 1, sub-s. 1 (*a*), the Legislature did not intend in respect of the period after December 1, 1922, that rent not recoverable by the landlord as the result of the decision in *Kerr* v. *Bryde* (1) should be recoverable by the tenant, if paid by him in error. That would be contrary to the main provision of the Act, which declares that the notice of increase of rent shall have effect as a notice to quit. The proviso to sub-s. 1 (*a*) is in form a proviso upon a proviso, and is not to be read in favour of the tenant. The effect of s. 1, sub-s. 1, is simply to prevent (*a*) the landlord, and (*b*) the tenant, from reopening old scores. The increases are validated by the Act in respect of the whole period, whether before or after December 1, 1922.

The plaintiff (the tenant) in person.

Cur. adv. vult.

Dec. 19. The judgment of the Court (SANKEY and TALBOT JJ.) was read by

SANKEY J. This is an appeal from the county court judge sitting in the West London County Court of Middlesex.

The tenant here claimed the sum of 26*l.* 18*s.* 11*d.*, being, as she alleged, sums due for rent paid in excess. She satisfied the county court judge that she had received no notice to quit the premises, and that therefore the landlord was not entitled to charge her an increased rent. The landlord did not appear, and upon June 5 the judge gave judgment for the tenant for the amount claimed. Upon June 7 the Rent Restrictions (Notices of Increase) Act, 1923, came into force, and an application was made upon behalf of the landlord to the judge to stay execution pending an appeal to this Court, which application was granted. On the hearing of the appeal, counsel appearing on behalf of the landlord submitted that he was entitled to have the appeal allowed. No proper argument was addressed to us on behalf of the

(1) [1923] A. C. 16.

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tenant; for although she attended in person, she was obviously a woman in humble circumstances and unable to appreciate the points of law raised against her.

In deciding the matter three questions call for determination: (1.) Is the Act retrospective? (2.) It being admitted that the Act was not passed until after the county court judge gave judgment, ought it to be applied in an appeal from that judgment? and (3.) if so, does it entitle the landlord to our judgment?

As to (1.) Is the Act retrospective? We are clearly of opinion that it is. Sect. 1, sub-s. 1, provides that a notice of intention to increase the rent, whether served before or after the passing of the Act, shall have effect, and shall be deemed always to have had effect as if it were, or had been, also a notice to terminate the existing tenancy. Further, the proviso in sub-s. 1 (*b*), implies that the Act affects judgments given before February 15, 1923, and these and other sections of the Act clearly show its retrospective character. As to (2.), we are of opinion that although the Act was not passed until after the hearing before the learned county court judge, still, as it was in force at the hearing of the appeal, it is applicable to the appeal: see judgment of Bankes L.J. in *Stovin* v. *Farebrass*. (1)

(3.) Does the Act entitle the landlord to judgment? This depends upon the construction of s. 1. It is well known that the Act was passed to deal with the situation created by the decision of the House of Lords in the case of *Kerr* v. *Bryde* (2), which had laid down that where a landlord had given a notice to increase the rent, but had not given a notice to quit the premises, he was not entitled to recover and was liable to refund any increase he had charged. The method of dealing with this situation under the Act is, in our opinion, as follows. It validates increases, although no notice to quit has been given, by making the notice of increase to be a notice to quit as well; but it says that everything done up to December 1, 1922, is to remain undisturbed, and the position as on that date is to be accepted. The position can be best

(1) 35 Times L. R. 659, 662. (2) [1923] A. C. 16.

illustrated by stating a proposition and giving a concrete example.

The proposition is that the first part of the section creates a new position by validating increases of rent which by the decision of the House of Lords in *Kerr* v. *Bryde* (1) had been declared illegal. The proviso to the section however places limitations upon the rights which would have followed from the fact that such increases had been validated. To take a concrete case :—

Assume that the landlord had increased the November rent by 5*s*. a week as from November 1 without having given a notice to quit. If he has not received the increase accrued due during November he cannot recover it. On the other hand if the tenant has paid the November increases he cannot get them back. The position is crystallized as on December 1, and we cannot hold that the enacting first part of the section, which favours the landlord by validating the increase, is cut down by the last words of the proviso beginning with the word "but." After December 1 the increases, being validated, are payable by the tenant. We are therefore of opinion that the increases of rent in this case having been so validated, and subject to such conditions, the tenant was not entitled to recover what she alleged to have been overpaid, and that the landlord is entitled to our judgment.

We should add that the judgment of the county court judge was perfectly correct when it was delivered.

Appeal allowed.

Solicitors for landlord : *Bull & Bull.*

(1) [1923] A. C. 16.

F. P. F.

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Oct. 31;
Nov. 1, 21.

THE KING *v.* ROBERTS.

Ex parte SCURR AND OTHERS.

Local Government—Metropolitan Borough Council—Excessive Payments to Employees—Illegality—Disallowance and Surcharge—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 62—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247, *sub-s.* 7.

Sect. 62 of the Metropolis Management Act, 1855, does not confer upon a Borough Council an absolute discretion to pay their employees any salaries and wages that they may think fit. Borough Councils are in a fiduciary relation towards the whole body of ratepayers, and must confine the exercise of their discretion in regard to such payments within the limits imposed by law.

A payment to an officer or servant employed by a Borough Council may be so excessive as to become an illegal or ultra vires payment. In such a case an auditor may properly disallow the excess, and surcharge the amount on the members of the Council who authorized the illegal payment.

RULE NISI for a writ of certiorari. (1)

The following statement of the facts is taken from the judgment of the Court: In this case the mayor, aldermen and a number of the councillors of the metropolitan borough of Poplar apply on eight grounds for an order from the Court to quash a certain certificate of disallowance and surcharge

(1) By s. 62 of the Metropolis Management Act, 1855: "... The Board of Works for every district under this Act, and the vestry of every parish mentioned in Schedule (A) to this Act, shall respectively appoint or employ or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit."

(The Borough Councils have now the powers and duties of the District Boards and Vestries.)

By s. 247, sub-s. 7, of the Public Health Act, 1875: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made."

made by the district auditor of the borough under which a sum of 5000*l.* was disallowed and surcharged upon them. The eight grounds are as follows: (1.) That the said surcharge is an improper limitation of the discretion vested in the Council under s. 62 of the Metropolis Management Act, 1855. (2.) That there is no evidence on which the district auditor could properly find that the Council or any member thereof has been guilty of any negligence or misconduct. (3.) That the said surcharge is not on the face of it or in fact an ascertained amount of the deficiency or loss incurred by such negligence or misconduct, if any, but a penalty. (4.) That the negligence or misconduct complained of, if any, is in the nature of an omission, and the district auditor has not found in whom the responsibility for such omission lies, and has abstained from surcharging the Council, and has not made it clear as to which, if any, of the members of the Council are responsible, and if responsible to what extent for such omission. (5.) That the said district auditor has failed to show whether the surcharge purports to be joint or several. (6.) That the said district auditor is not entitled in law to surcharge for alternative reasons on two different classes of councillors, and that the surcharge is bad for uncertainty. (7.) That while the notice of surcharge sent to C. W. Key, Esq., states as the sole ground of surcharge the payment of wages in excess of wages scales agreed by the representatives of the respective grades or sections of employees, the reason for such surcharge as disclosed in the report of the said auditor to the Council is the disregard of subsequent variations in the cost of living. (8.) That in any case the person accounting liable to surcharge is the Council and not the councillors.

The facts are as follows :—

In the year 1914 there were no striking variations between the scales of payment made by the several metropolitan Borough Councils on account of wages of the several grades of their employees. The wages paid them by the borough of Poplar were not the highest compared with those of the other metropolitan councils, but were somewhat above the

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average, the minimum wage for the lowest grade of labour being 30*s.* weekly for men and 22*s.* 6*d.* weekly for women. By increases from time to time the minimum wage for similar labour had risen by April 30, 1920, to 64*s.* and 49*s.* 9*d.* respectively. When auditing the accounts for the year ending March 31, 1921, the auditor found that a marked increase in the wages scales had taken effect from May 1, 1920, and that from that date a minimum wage of 80*s.* per week for men and women of the lowest grade of workers had been maintained. He did not then raise any objection to such increases by reason of the fact that the cost of living had during and subsequent to the Great War greatly increased. At the audit beginning upon January 26, 1923, he found that the above rate of 80*s.* a week was still being maintained, although the cost of living had been materially reduced. He then proceeded to ascertain the rate of wages payable elsewhere in the London area, founding himself upon the agreed rates of the trade union and other awards appropriate to the several groups of employees. He also prepared charts which were exhibited to the affidavit he filed in the case which show: (*a*) The bonus rates paid by the borough of Poplar since April, 1920. (*b*) The bonus rates corresponding to the extra cost of living as shown in the Labour Gazette. (*c*) The bonus rate agreed upon in the awards of the Joint Industrial Council, London district, or of the appropriate trade union.

The Joint Industrial Council, generally known as the Whitley Committee, is a body comprising representatives of employers and employed in equal numbers which was set up to report upon the relations between employers and employees. It is not necessary to go into elaborate detail, but it is sufficient to refer to para. 9 of the auditor's affidavit, which is as follows: "I found (*a*) that the total of the wage payments made by the Council in the year 1921–22 exceeded by about 17,000*l.* the total amount of the wages that would have been paid by them if the agreed wages of the awards referred to had been adopted, and that the rates of payment were much above those contained in the said awards in the

last two months of that year. (*b*) That on a comparison with the weekly wages paid in 1914 increased by a bonus proportionate to the increase in the cost of living, the Council's wages payments in 1921–22 showed an excess of over 25,000*l.* (*c*) That the wage increases paid at the end of the year 1921-22 were more than sufficient to compensate this increase in the cost of living by fully 100 per cent. in the case of men of Grade A, 200 per cent. in the case of women of Grade A, 80 per cent. in the case of men of Grade B, 85 per cent. in the case of general labourers. (*d*) That as the working hours per week were considerably shorter in 1921 and 1922 than in 1914, the figures given in (*b*) and (*c*) above would be much greater if the comparison were applied to wages per hour instead of to wages per week, and that the excess of over 25,000*l.* mentioned in (*b*) above would thus be raised to an excess of more than 35,500*l.* (*e*) That in the lower grades the new minimum rate varied from nearly three times to over four times the rate paid per hour in 1914."

With this result before him, he thought it incumbent upon him to consider whether his duty, as laid down by sub-s. 7 of s. 247 of the Public Health Act, 1875, required him to disallow any part of the Council's wage payments during the year 1921 or 1922, or to make any surcharge in respect of loss to the rate fund unjustifiably incurred. He thereupon adjourned his audit till May 31, 1923, and gave notice of that fact to those persons who were members of the Council during the course of the year to which the audit applied, in order that they might have an opportunity of attending and making such representations as they thought proper. A number of them attended, and the auditor heard what they had to say. He then came to a determination which is set out in his affidavit, as follows : " On the facts which were in evidence at the audit and on the statements made before me by some of the applicants in this case, I took the view that the Council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers whose funds they administered, had imposed unreasonable charges upon those

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funds, and had made payments which were far in excess of those necessary to obtain the service required and to maintain a high standard of efficiency, and which were thus in reality gifts to their employees in addition to remuneration for their services, and that the persons responsible had thus incurred an unjustifiable waste of the rate fund and had acted arbitrarily and contrary to law. Although I agreed that in May, 1920, the Council exercised their statutory power with due care in determining the wages to be paid for the time being to each group of manual workers, I have acted on the view that in maintaining a minimum wage of 4*l.* a week for unskilled labour after the reason for the increase to this level had to a large extent disappeared, was not a reasonable and legitimate exercise of their statutory power. In particular I formed the opinion that a certain resolution, passed by the Council on August 31, 1921, to the effect that no reduction of wage or bonus should be made during the ensuing four months which was subsequently acted upon for twelve months was not a legitimate exercise of the Council's power. It disregarded very important reductions which had already taken place in the cost of living and in the trade union and other awards, and during the period of its operation further important reductions were likely to occur and did in fact occur. This resolution and its extended application I regarded as ultra vires of the Council. I disallowed payments on account of wages amounting to the sum of 5000*l.* in the accounts of the Council for the year 1921–22, and for so doing I stated my reasons in my certificate hereinafter referred to. I surcharged the said sum of 5000*l.*" It is this disallowance and surcharge of 5000*l.* that the applicants in this case seek to quash.

Talbot K.C. and *Sir John Lithiby* showed cause. The contention of the Borough Council is that under s. 62 of the Metropolis Management Act, 1855, they have an unfettered discretion to pay their employees such wages as they may think fit, and that the auditor has no power to control such expenditure. Such a contention cannot be maintained.

The powers of the auditor are contained in s. 247, sub-s. 7, of the Public Health Act, 1875, which provides that an auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment." The payment in question is so excessive as to come within those words. The Council were not surcharged as a whole, but only on the footing that the individuals named were responsible for authorizing the payments which the auditor held to be illegal. If any persons can show that they took no part in the allowance of the payments, it is not desired to surcharge them. The auditor was of opinion that above a certain point the payments ceased to be wages and became mere largess.

Slesser in support of the rule. The question is whether the auditor had jurisdiction to disallow and surcharge these items under s. 247, sub-s. 7, of the Public Health Act, 1875. The present case is not one of misconduct, but of payments which are alleged to be contrary to law. The auditor has proceeded upon a wrong basis. The payments were not illegal in character. They only became so, if at all, because they were not sufficiently limited in amount. That may constitute negligence, but not illegality. The question is as to the amount of care to be required from the members of the Council: *Rex* v. *Browne*. (1) The words of s. 62 of the Metropolis Management Act, 1855, mean that the Council may pay what wages they like provided that they do not fail in their duty as councillors. Assuming that this Council has paid more than has been paid in the district, it is not necessarily an illegal payment, apart from any misconduct. The trend of the decided cases is to allow the Councils to pay what wages they may think right: *Livingstone* v. *Westminster Corporation*. (2) Further, this surcharge was not for an ascertained amount, but for a round sum. It was in fact a penalty: *Barton* v. *Piggott*. (3) In view of the decision of the Court of Appeal in *Rex* v. *Carson Roberts* (4) the point

(1) [1907] 2 I. R. 505.
(2) [1904] 2 K. B. 109.
(3) (1874) L. R. 10 Q. B. 86 90.
(4) [1908] 1 K. B. 407.

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that the Council, and not the councillors, ought to have been surcharged cannot be argued in this Court.

Montgomery K.C. and *Naldrett* appeared by leave of the Court for four dissentient councillors, and were treated as if a separate rule had been granted. It was made absolute by consent.

Cur. adv. vult.

Nov. 21. SANKEY J. read the judgment of the Court, (LORD HEWART C.J., SANKEY and SALTER JJ.), which after stating the facts above set out, continued: It should be stated that the surcharge was made on all the members of the Council, but on the hearing the case was abandoned against four who had not voted for the increases, and they were dismissed from the case. When the matter came on for argument the learned counsel who appeared on behalf of the auditor expressly disclaimed any charge of negligence or misconduct against any of the persons affected, and based his case upon the first words of sub-s. 7 of s. 247 of the Public Health Act, 1875, which provides: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment." We now deal with points taken by the applicants: (1.) That the surcharge is an improper limitation of the discretion vested in the Council under s. 62 of the Metropolis Management Act, 1855, which provides that they may employ such servants as may be necessary, and pay them such salaries or wages as they, the Council, "may think fit."

It was argued on their behalf that it is the Council themselves who are to be the judges of what they think fit, and that if they exercised their discretion honestly, as was admitted in this case, the auditor had no right to interfere. They admitted that an auditor had a right to disallow an item contrary to law and to surcharge the same, but contended that an item contrary to law meant an item of payment which was ultra vires—e.g., to a person or for an object to whom or for which they had no power to devote it. Great reliance

was placed on their behalf upon the case of *Rex* v. *Carson Roberts* (1), where it was held that the Westminster Council were not necessarily obliged to accept the lowest tender for materials to be supplied, and that they could not be surcharged in a case where they had accepted the higher tender for the same materials offered by an equally reputable firm. It was said that the price to be paid for labour did not stand on a different footing from that to be paid for materials as far as the right of the auditor to surcharge is concerned, and that in the present case they, the Council, were entitled to set an example, as a model employer, and to pay the 4*l.* a week in question.

It therefore becomes necessary for us to state our view as to the proper construction of s. 62 of the Metropolis Management Act, 1855, and s. 247, sub-s. 7, of the Public Health Act, 1875, above referred to. We, however, desire at the threshold of our judgment to say that we do not propose to lay down any hard and fast rule as to what sum a Borough Council may or may not expend, or as to what sums a district auditor may or may not surcharge. By law the decision as to such payments rests primarily with the Council themselves, and we should not desire to say anything to fetter or embarrass their discretion when it is properly exercised. Circumstances alter cases; what may be proper to be paid in one year may be entirely improper to be paid in a subsequent year. What may be proper to be paid in one district may or may not be proper to be paid in another. Again, we do not desire to fetter or embarrass the discretion of an auditor in his duty of coming to a conclusion whether a surcharge should or should not be made, or, indeed, to fetter our successors by laying down general rules as to when an auditor is to be held right or wrong. While, however, it is neither desirable nor indeed possible to lay down a definite standard, it is always possible, although not always easy, to say whether on the particular facts of a case a Borough Council has or has not exceeded its powers, and whether an auditor has or has not been right in making a surcharge. The

(1) [1908] 1 K. B. 407.

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question, on a proper determination of the law, becomes largely one of fact.

To deal with s. 62 of the Metropolis Management Act, we cannot think that the words "as they think fit" entitle a Council to pay any sum they like to any of their employees. We are not in agreement with the argument that as long as they do not pay a sum of money to persons to whom they are not entitled to pay it, or for purposes to which they are not entitled to devote it, they can do as they please. The Council are in a fiduciary position, not merely towards a majority who have elected them, but towards the whole of the ratepayers. A councillor is not entitled to follow the course which in his private capacity he might think it proper or advisable to pursue, but must confine his discretion within the limits imposed by law. He is not entitled to be unduly generous at the expense of those on whose behalf he is a trustee. We think that a payment to a servant entitled to be employed and entitled to be paid by the Council may be of so excessive a character as to go beyond the limits of legality, and become an illegal or ultra vires payment. In cases near the line it would be as difficult for an auditor to surcharge as it would be for this Court to overrule an auditor. Assume, for example, that a wage of 3*l.* was admittedly proper, and the wage paid was 3*l.* 3*s.*, it might be that in such a case an auditor could not, and probably would not, interfere. Supposing, however, a wage of 3*l.* to be a reasonable one, and a wage of 30*l.* to have been paid, there would in our view be material upon which an auditor could, and in that case ought to find the payments to be illegal and to make a surcharge in respect thereof. In our view the present case is not near the line. The auditor has gone into very careful calculations. He has taken into account everything that ought to have been taken into account. He has gone so far as to add to the wages which he thinks proper to have been paid a considerable additional sum, but, in spite of all that, he finds that the figure of 5000*l.* has been paid over and above the total so ascertained. We think that this sum is of such a character as to bring it within the words an "item of

account contrary to law" within the meaning of sub-s. 7 of s. 247, and we therefore think that he was right in disallowing and surcharging as he did.

One point remains to be noticed. It was said that the Council came to an understanding with their employees to fix a minimum wage for certain of them at a time when those particular employees would have been earning more under the award of the Joint Industrial Council, and that it would not be fair, under the circumstances, for the Council to reduce the minimum when the wages of the Joint Industrial Council went below the minimum. We feel strongly that if there had been any foundation for this allegation, and if the sums alleged by the auditor to be excessive had been paid in pursuance of such an undertaking, the councillors ought not to have been surcharged in respect of such payments; even if there had not been a definite agreement between the Council and their employees, but only an understanding to that effect, as alleged, which had been acted on, and so enhanced the wages total, we should not have thought it right to support a surcharge in respect of payments made in pursuance of such understanding. We are not here discussing a case where it is alleged that the agreement or the understanding was one that the Council would maintain indefinitely; it was only suggested that the understanding ought to be observed during the accounting year.

We have examined the evidence very carefully, and not only do we find that there was (1.) no such agreement, and (2.) no such understanding as suggested, but the facts point the other way, and show that in respect of many classes of labour no such agreement or understanding was come to, whereas in respect of the classes in which it might possibly be contended that there was an understanding, the auditor has made due allowance.

As to the second ground, as above stated, the auditor did not rest his case on negligence or misconduct. As to ground (3.), it is impossible to support this ground. It is clear from the affidavit of the auditor that the amount he has surcharged has been arrived at as the result of very

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careful calculation, and is in no way in the nature of a penalty. Ground (4.): This ground fails. Negligence and misconduct, as above stated, were not charged, and the auditor makes it clear that he has surcharged only those who voted for and supported the payments which he found to be illegal. Ground (5.): This ground is untenable, having regard to s. 247, sub-s. 9, of the Public Health Act, 1875, which provides that the surcharges made may be recovered by like persons and with the like powers as in the case of sums certified at the audit of poor rate accounts. By the Poor Law Amendment Act, 1844, such surcharges may be recovered from all or any of the persons making the impeached payments. Grounds (6.) and (7.): It is sufficient to say that the facts do not support these grounds. Ground (8.): It was admitted by the learned counsel for the applicants that this point was not open to him in this Court.

In the result we are of opinion that the rules should be discharged with costs.

Rule discharged.

Solicitors showing cause: *Last, Sons & Fitton.*
Solicitor in support of the rules: *W. H. Thompson.*
Solicitors for dissentient councillors: *White & Leonard.*

F. C.

[IN THE COURT OF APPEAL.]

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RUSSELL AND ANOTHER *v.* BEECHAM AND ANOTHER.

[1922. R. 1916.]

Landlord and Tenant—Lease—Covenant—"Assign or part with"—"Lease or premises or any part thereof"—Subletting Part of Premises—Forfeiture—Notice in Writing before Forfeiture—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6.

A lease for thirty years from March, 1899, contained a covenant by the lessee that he would not "assign or part with this lease or the premises hereby demised or any part thereof" without the licence and consent in writing of the lessor or his trustees. The lease also contained a proviso for re-entry by the trustees for breach of his covenants by the lessee.

An assignee of the lease with the consent of the lessor made by sub-demise a mortgage by which (1.) the mortgagor was debarred from exercising the powers of leasing conferred on mortgagors by s. 18, sub-s. 1, of the Conveyancing Act, 1881, and (2.) the mortgagor attorned and became tenant at will to the mortgagee. The mortgagor then, without the consent of the lessor of the thirty years' lease or of his trustees, in November, 1921, by an agreement in writing sublet part of the demised premises for three years from Michaelmas, 1921.

The trustees of the lessor of the thirty years' lease, without serving any notice under s. 14 of the Conveyancing Act, 1881, brought an action against the mortgagor to recover the demised premises on the ground that giving the tenant possession under the agreement of November, 1921, was a breach of the covenant in the lease not to assign or part with the lease or the premises thereby demised or any part thereof:—

Held, by Bankes, Scrutton and Atkin L.JJ., that the action was not maintainable:

By Bankes and Atkin L.JJ. on the ground that on the true construction of the covenant "assign" and "part with" mean part with the whole interest in the premises or in any part thereof and do not include a subletting of part of the premises; or that at the most the expression "part with" is ambiguous and may exclude parting with part of the lessee's interest in part of the premises, and that a lessor insisting on a forfeiture for breach of covenant must express the covenant in unambiguous terms.

Doe v. *Hogg* (1824) 4 D. & R. 226 followed.

By Scrutton L.J. on the ground that a covenant against parting with possession of part of the premises is a different covenant from a covenant against parting with possession of the premises:

Church v. *Brown* (1808) 15 Ves. 258, 265, followed;

that the former covenant was not within the exception in sub-s. 6 of s. 14 of the Conveyancing Act, 1881, and that therefore a notice under

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sub-s. 1 was necessary before the plaintiffs could enforce a right of entry for a breach of it.

Judgment of Bailhache J. affirmed on different grounds.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The plaintiffs were the trustees of the will of the Seventh Duke of Bedford.

By an indenture of lease dated November 9, 1899, the Eleventh Duke of Bedford as tenant for life under the said will demised unto Robert Smith therein called the lessee a messuage or tenement known as No. 36 Bedford Place, Bloomsbury, in the County of London for a term of thirty years from March 25, 1899, at a rent of 100*l.* a year payable by equal quarterly payments.

The lease contained the following covenant: "The lessee shall not nor will during the last ten years of the said term hereby granted assign or part with this lease or the premises hereby demised or any part thereof without the licence and consent in writing of the said Duke or the said trustees or his or their steward or agent first had and obtained."

The lease also contained the following proviso and condition: "That if at any time hereafter the said yearly rent hereby reserved or any part thereof shall be in arrear or unpaid for 21 days after the same shall have become due whether the same shall have been legally demanded or not or in case the said lessee shall not truly observe perform and keep all and singular the covenants and provisions herein on the part of the said lessee contained then it shall be lawful for the said trustees notwithstanding the waiver of any previous right of re-entry into the premises hereby demised or any part thereof in the name of the whole to re-enter and the same to repossess as if this lease had never been made but without prejudice to any rights or remedies which may then have accrued to the said Duke or the said trustees in respect of the rent covenants conditions and agreements hereinbefore reserved and contained."

After divers mesne assignments finally by an indenture of assignment dated September 29, 1921, the said term became

vested in the defendant Sir Thomas Beecham, Baronet, for the residue thereof.

By an indenture of mortgage dated September 29, 1921, the defendant Beecham mortgaged the said term except the last day thereof to the defendant Harold Hamilton Matthews as security for repayment of a loan of 700*l.* and interest thereon. By another indenture of mortgage of the same date the defendant Beecham mortgaged the said term except the last two days thereof to the defendant Matthews, subject to the said mortgage of 700*l.*, as security for repayment of a loan of 1730*l.* and interest. Both these indentures were made and executed with the licence and consent in writing of the plaintiffs or their steward. In both indentures it was expressly provided that the powers of leasing conferred on mortgagors by s. 18, sub-s. 1, of the Conveyancing Act, 1881, should not be exercisable by the borrower, the defendant Beecham, and that the said borrower thereby attorned and became tenant at will to the lender, the defendant Matthews, of the said premises at the yearly rent of a peppercorn during such times as the respective sums of 700*l.* and 1730*l.* or any part thereof should remain due and owing on the security of the said indentures respectively. The second indenture also provided that s. 17 of the Conveyancing Act, 1881, should not apply to that indenture.

By an agreement in writing dated November 23, 1921, the defendant Beecham, therein called the landlord, agreed to let to one Edwin Grice, therein called the tenant, who agreed to take the two principal rooms on the ground floor of the demised premises for three years from September 29, 1921, at a rent of 100*l.* a year, the tenant to have the option of continuing the tenancy for successive periods of three years so long as the landlord or his assigns should remain lessee of the premises. This agreement was made without the licence or consent of the Duke of Bedford or his trustees or their steward or agent. The said E. Grice went into possession of the two rooms under it.

On August 15, 1922, the plaintiffs, without serving on the defendant Beecham any notice in writing specifying any

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breach of covenant or requiring him to remedy or make compensation for any breach, as provided by s. 14, sub-s. 1, of the Conveyancing Act, 1881 (1), issued the writ in this action claiming possession of the premises comprised in and demised by the lease of November 9, 1899, alleging that the subletting to Grice was a breach of the covenant not to assign or part with the lease or the premises thereby demised or any part thereof without the licence and consent in writing of the Duke of Bedford or his trustees or their steward or agent. The defendant Matthews did not appear at the trial.

Bailhache J. gave judgment for the defendant Beecham on the ground that, inasmuch as this defendant had no power to let to Grice, the supposed tenancy of the latter was a mere nullity and the parting with possession to him of the two rooms was not therefore a breach of the covenant in the lease of November 9, 1899. In the course of his judgment the learned judge said: "In considering whether the covenant has been broken the covenant in the head lease must be disregarded, and the question is whether apart from that covenant the lease complained of is a breach of covenant against underletting; whether as between the termor, in this case the defendant Beecham, and the person to whom the premises were underlet, in this case Grice, the underletting is a valid underletting. The matter is a difficult one. There seems to be no strong authority one way or the other; but in my judgment a covenant such as this is not broken unless the alleged breach is by some person who can

(1) Conveyancing Act, 1881, s. 14, sub-s. 1: "A right of entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

By sub-s. 6: "This section does not extend—(i) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased." . . . .

and does give a good title to the person claiming under him, irrespective of course of the covenant against assignment in the head lease. To constitute a breach there must be a present legal right in the person, who purports to assign, let, or part with possession, so to do. For instance, if the person in whom the original term was vested sublets on a seven years' lease with the consent of the reversioner, the sublease is good and, if the sublessee is not restrained from underletting, a letting by him to a yearly tenant would be good as against the original termor; and if such a tenancy were created without the reversioner's consent it would work a forfeiture of the original term if there was in the original lease a covenant against underletting. If, on the other hand, the seven years' lessee were restrained from underletting a tenancy from year to year created by him would be bad as against the original termor. The yearly tenant would be as against that termor a trespasser, and there would be no breach of the covenant against subletting without the consent of the reversioner. This seems to me to be the case here. Sir Thomas Beecham had no right to let to Grice; Grice was a trespasser, and the covenant has not in my opinion been broken. This conclusion seems to me sound in principle; otherwise a letting unauthorized by the person in whom the original term was vested might destroy the term. Moreover I think the conclusion is supported by the reasoning in *Doe* v. *Powell*. (1) In the circumstances of this case the covenant has not in fact been broken, and the action, so far as it is based on the breach of covenant against assigning, subletting, or parting with possession, fails."

The plaintiffs appealed.

Rayner Goddard K.C. and *Tucker* for the appellants. The learned judge was wrong in holding that there was no breach of the covenant not to assign or part with the demised premises or any part thereof. There was a parting with possession to Grice of part of the demised premises, the two rooms on the ground floor. *Doe* v. *Powell* (1), relied upon by

(1) (1826) 5 B. & C. 308.

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the learned judge, affords him no support (1.) because the alleged assignment in that case was void and not an assignment at all, and (2.) because possession was not given under it. The agreement of November 23, 1921, by which the rooms were let to Grice was not void. It was valid as an act in the law, although it might give rise to an action for breach of covenant. It is hard to imagine how an act which has no effect in law can be a breach of covenant. Moreover it might, if the lessor should so elect, be a ground of forfeiture. The Court would never sanction a forfeiture as a penalty for doing an act which had no effect. It is an error to say that Grice was a trespasser. His possession was lawful until the lessors elected to put an end to it. The error is in confusing a void with a voidable act.

[They cited *Corbett* v. *Plowden*. (1)]

Sir H. Maddocks K.C. and *Jacobs* for the respondent. The possession which the respondent conferred upon Grice was not a possession immediately derived from the appellants, but from Matthews, his mortgagee, to whom he was tenant at will. The agreement of November 23, 1921, was a breach of one of the covenants in the mortgage deed—namely, that he should not exercise the statutory power of leasing; but this parting with possession would not have been a breach of a covenant by Matthews not to part with possession: *Bryant* v. *Hancock & Co.* (2); and a fortiori cannot be a breach by the respondent, between whom and the appellants there is, quoad this possession, no privity. Where a tenant has covenanted not to part with possession, a parting with possession by him is not a breach of the covenant unless the possession was acquired immediately from the covenantee. At the most Grice acquired a share of the possession with the respondent; but to share possession with another is not to part with possession: *Peebles* v. *Crosthwaite* (3); and a covenant not to share possession is not within sub-s. 6 of s. 14 of the Conveyancing Act, 1881: *Jackson* v. *Simons*. (4) Consequently a notice in writing under

(1) (1884) 25 Ch. D. 678.
(2) [1898] 1 Q. B. 716.
(3) (1897) 13 Times L. R. 198.
(4) [1923] 1 Ch. 373.

sub-s. 1 is necessary before a forfeiture could be enforced for breach of it.

Furthermore to assign underlet or part with possession of the demised premises means to assign underlet or part with the lessee's whole interest in the premises, and not to underlet part of the premises: *Crusoe* v. *Bugby* (1); *Doe* v. *Hogg*. (2)

[SCRUTTON L.J. Does "parting with the possession of the land leased" in s. 14, sub-s. 6, of the Conveyancing Act, 1881, include parting with possession of part of the land leased? I doubt it: *Church* v. *Brown*. (3)]

Rayner Goddard K.C. in reply. Lord Eldon in *Church* v. *Brown* (4) was construing a covenant in a lease and considering whether it was or was not a usual covenant. Much less strictness is to be applied in interpreting a sub-section merely describing the kind of covenant to be excluded from a principal enactment. "Underletting, parting with the possession, or disposing of the land leased" in s. 14, sub-s. 6, of the Conveyancing Act, 1881, surely includes parting with possession of part of the land leased. If so no notice was necessary before proceeding to enforce the forfeiture, and the appellants are entitled to succeed.

BANKES L.J. This case lies in a small compass, but it raises an important point.

In August, 1922, an action was brought at first against Sir T. Beecham alone and then by amendment against his mortgagee also. The plaintiffs claimed to recover possession of the premises for breach of covenant by Sir T. Beecham in letting the premises to one Grice for three years from September 29, 1921, under an agreement dated November 23, 1921, giving the tenant the option of continuing the tenancy for successive periods of three years so long as the landlord or his assigns should remain lessees of the premises. It is said that this letting to Grice constituted a parting with possession of the premises, which was a breach of covenant.

Apart from authority I do not think anybody would deny

(1) (1771) W. Bl. 766; 3 Wils. 234.
(2) 4 D. & R. 226.
(3) 15 Ves. 258, 265.
(4) 15 Ves. 258.

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that this letting to Grice was a parting with possession and a breach of a covenant not to part with possession of the demised premises; but the question we have to decide is whether the letting was a parting with possession of the premises or part thereof, regard being had to the peculiar terms of the covenant in the lease of November, 1899. Bailhache J., as I understand his judgment, decided the case against the plaintiffs on the ground that the letting to Grice might be treated as a nullity, and therefore did not affect the position of the defendants or either of them. I cannot take that view of the legal position of those parties. I make no further reference to that point, because I do not think it is necessary to the decision of this appeal.

The two material points which were raised and argued are (1.) that upon the true construction of the covenant in the lease of 1899 there was no breach of that covenant; and (2.) that if there was a breach the appellants cannot bring this action of ejectment upon it, because they have not served the notice required by s. 14 of the Conveyancing Act, 1881.

I will take the second point first. It was said that a notice was necessary, because this case did not fall within the exceptions in sub-s. 6 (i), which provides that sub-s. 1 is not to extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; it was urged that a covenant not to part with possession of the whole of the demised premises and a covenant not to part with possession of part of the demised premises are two separate and distinct covenants; that there has been no parting with possession of the whole of the premises but only a parting with possession of part of the premises, and that sub-s. 6 contains no exception of a covenant not to part with possession of part of the premises, and therefore before a lessor can insist on a forfeiture for breach of that covenant a notice under s. 14, sub-s. 1, is necessary. Speaking for myself, if it were necessary to decide upon the merits of that argument I should like to give further consideration to it, because the results of accepting it would be very far reaching. But I do not propose to offer

any opinion upon this question. I am prepared to decide the case upon the other point—namely, the construction of the covenant. The special and peculiar form of words in which it is expressed has for many years received a particular and well recognized interpretation, and where that is the case the Court should accept that interpretation, because it must realize that a number of transactions have been entered into and a number of documents have been drawn in the particular form upon the faith of the interpretation the Courts have placed upon it. The words of the covenant are: "The lessee shall not nor will during the last ten years of the said term hereby granted assign or part with this lease or the premises hereby demised or any part thereof without the licence and consent in writing of the said Duke," etc. The words "assign or part with" are used in relation to two subject matters: one, the lease; the other, the premises thereby demised or any part thereof. Now in the phrase "assign or part with this lease," though one might be disposed to think the draftsman used "part with" as meaning something different from "assign," yet the authorities have decided that "assign" means part with absolutely, and that the two expressions "assign" and "part with" in this context mean the same thing. *Doe* v. *Hogg* (1) was an action for ejectment for breach of a covenant not to "grant any underlease for any term whatsoever; or let, set, assign, transfer, set over or otherwise part with the said messuage or tenement hereby demised, this present indenture of lease, or his or their term or interest by these presents granted, or any other part thereof." . . . . The alleged breach was the deposit of the lease with certain brewers as security for supplies of beer. Abbot C.J. said: "I am clearly of opinion that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord, without his consent in writing. Now here the lease has not been parted with in that, which I take to be the fair construction of the words of the covenant. All that the lessee

(1) 4 D. & R. 226, 228.

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does is to deposit the lease as a security for beer supplied to the house, which I think he was at liberty to do." Bayley J., after referring to the covenant in *Crusoe* v. *Bugby* (1), said: "The question there was, whether the fact of the lessee having granted an underlease of the premises worked a forfeiture, and the Court said, 'The Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy, as well as against an assignment, but he has not done so by words which admit of no other meaning. *Assign*, *transfer*, and *set over*, are mere words of assignment—*otherwise do*, or *put*, *away* (2) signifies any other mode of getting rid of the premises entirely, and cannot be confined to the making an underlease.' That is an authority in point, and the words here must receive the same construction. The lessee has only deposited the lease as a security, which it was competent for him to do. There is no 'parting with the legal interest' within the meaning of the covenant, because the lessee might at any time redeem the indenture by paying off the incumbrance upon it." If a lessor wishes to provide for a forfeiture of the lease in the event of the tenant parting with possession of the tenement, as opposed to parting with his interest therein, nothing is easier than to say so in language which in the words of Bayley J. admits of no other meaning, yet in this particular covenant the word "possession" is not used. In these circumstances it seems to me that the Court has put upon the expressions "part with the premises" and "part with this indenture" a certain construction excluding a mere change of occupancy, and I am confirmed in this view by the common knowledge that covenants against assigning and underletting commonly go on to provide that the lessee shall not "part with possession of the demised premises." Those words being omitted from the covenant in this case, I think this Court ought to follow

(1) W. Bl. 766.

(2) This seems to refer to the covenant in *Crusoe* v. *Bugby* W. Bl. 766.

the guidance of *Crusoe* v. *Bugby* (1) and *Doe* v. *Hogg* (2) and hold that the lessor not having made plain beyond question the intention that mere parting with possession should be a cause of forfeiture, the lessee is entitled to succeed and the appeal must be dismissed.

SCRUTTON L.J. This is a case of some difficulty. It is an action upon a forfeiture of a leasehold interest. The learned judge below has given his reason for holding that the leasehold interest was not forfeited. Bankes L.J. disagrees with the learned judge's reason, but holds that his conclusion is to be supported on another ground, while declining to decide whether it can also be upheld on a second suggested ground. I think the judgment can be supported on the second ground, and decline to give an opinion on the merits of the first ground.

The forfeiture is based on a breach of covenant. The covenant is against assigning or parting with the premises demised or any part thereof without the licence in writing of the Duke of Bedford. No notice has been given under s. 14 of the Conveyancing Act, 1881, specifying the particular breach complained of and requiring the lessee to remedy the breach if capable of remedy, and in any case requiring him to make compensation in money, and without such a notice no right of entry can in general be enforced. But sub-s. 6 contains an exception from that provision in the case of "a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased." Unless the covenant is within those words notice is required. Does the covenant in this case come within those words? A similar question came before Romer J. in *Jackson* v. *Simons* (3), where a lessee had covenanted not to assign or underlet or part with the demised premises or any part thereof or part with or share the possession or occupation thereof or of any part thereof. It was alleged that the lessee had shared the possession with

(1) W. Bl. 766. (2) 4 D. & R. 226.
(3) [1923] 1 Ch. 373.

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another person and so incurred a forfeiture. No notice had been given him as provided by s. 14. Romer J. held that a covenant against sharing possession was another and a different covenant from a covenant against assigning underletting or parting with possession, and was not included in the exception in sub-s. 6, and therefore notice was necessary before the forfeiture could be enforced. The covenant in the present case is not against sharing possession; it is against parting with the premises or any part thereof. The question is whether a covenant against parting with possession of part of the premises is included in a covenant against parting with the possession of the land leased. I might have been slow in coming of myself to a conclusion on this question; but I find that in *Church* v. *Brown* (1) Lord Eldon, whose doubts were said to be more valuable than other men's certainties (2), said that a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises; these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The question was whether a covenant against assigning without licence was a usual covenant in a lease. Lord Eldon argues, if that is a usual covenant, is a covenant against underletting, which is another and a different covenant, also a usual covenant? And if it is, is a covenant against parting with possession a usual covenant? And if it is, what of yet another and different covenant—namely, a covenant not to part with a part of the premises? Is this also to be considered a usual covenant? I am content to follow Lord Eldon, and to hold that a covenant not to part with a part of the premises is a different covenant from a covenant against parting with the

(1) 15 Ves. 258, 265.

(2) Sir John Nisbet of Dirleton, King's Advocate in the time of Charles II., was the author of a law book known as Dirleton's Doubts. Sir James Steuart of Goodtrees, Lord Advocate in the reigns of William and Mary and Queen Anne, was the author of another known as Dirleton's Doubts Resolved. The Doubts hold a higher place than the Resolutions. See Brewer, Dict. of Phrase and Fable (ed. 1895), p. 357, sub nom. Dirleton.

possession of the premises; that therefore a notice was required before a forfeiture could be enforced, and consequently that the action fails.

On the point on which Bankes L.J. has decided this appeal I say nothing. If it were necessary for me to decide it I should desire further time in which to consider a number of cases on conveyancing which have come or been brought before us. Guided by the light of nature and unillumined by authority I should have thought it was clear that Sir T. Beecham had parted with part of the premises when he had let Mr. Grice into possession under the agreement; but that is not the way in which to approach these covenants which have been drafted, altered, and gradually built up because of past decisions of the Courts, and there is much reason for thinking that my unaided view would not be the correct one. For these reasons I give no opinion upon this point, but decide the case as I have done on the other point, agreeing with the decision but not with the reasons of the learned judge.

ATKIN L.J. I agree that the appeal must be dismissed. The learned judge dismissed the action on the ground that the act of the defendant in granting an underlease to Grice was an act of no legal validity and was therefore not a breach of covenant. I cannot assent to that reasoning. He says, if a person in whom an original term of years was vested sublet on a seven years' lease with the consent of the lessor, the sublease is good; and so it is; and, he continues, if the sublessee is not restrained from subletting, a letting by him from year to year is good against the original termor; again that is right. Then he goes on: "If on the other hand the seven years' lessee were restrained from underletting, a tenancy from year to year created by him would be bad as against the original termor. The yearly tenant would be as against that termor a trespasser." That appears to me to be wrong. There is no doubt that if a person has a term of years the mere fact that he is restrained by covenant from assigning or underletting does not preclude his assignee or

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underlessee from acquiring an estate, although he acquires it subject to forfeiture at the instance of a superior landlord. In the present case Sir T. Beecham was tenant for a term of years, and had mortgaged by way of subdemise to Mr. Matthews, retaining a reversion of two days out of the original term, and by the mortgage deed expressly he became a tenant at will to the mortgagee. These were the circumstances in which he granted the lease to Grice.

The plaintiffs say by letting Grice into possession under this lease Sir Thomas Beecham committed a breach of his covenant not to part with the premises or any part thereof. I am not prepared to say that it was a breach of the covenant. I think the covenant is very difficult to construe. In ordinary usage the words "part with" are ambiguous. They may mean part with entirely or part with for a time. A man if asked whether he had parted with his house might say, "No, I have not parted with my house, though I have let it furnished for six months to a tenant"; or he might say, "Yes, but only for six months." But furthermore we are not dealing with words in their ordinary use. We have to construe them with reference to decisions of the Courts, for, in reliance upon the meaning attributed to them by those decisions, they are inserted in documents which have for years regulated the relation of landlord and tenant. A Court would be very ill advised to disturb a construction which has authoritatively been placed upon a particular form of words and generally accepted for years. Now it was decided in *Doe* v. *Hogg* (1) in the year 1824 that the words "part with" in a covenant like this mean "part with entirely" or "part with completely." That case only confirms *Crusoe* v. *Bugby* (2), decided in 1771, where the principle which should guide the Courts is clearly established. "The lessor, if he pleased, might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning"; which I take to mean "by words which reasonably construed admit of no other meaning." In the

(1) 4 D. & R. 226. (2) 1 W. Bl. 766.

present case the lessor has used words which at the best are ambiguous, and he cannot complain if the Court puts a strict construction on the words of a covenant which if broken entails a forfeiture, and so doing declines to allow the forfeiture. Therefore I agree with Bankes L.J. that the appeal should be dismissed. Upon the ground relied on by Scrutton L.J. and the construction of s. 14 of the Conveyancing Act, 1881, I prefer to say nothing one way or the other.

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Appeal dismissed.

Solicitors for appellants: *H. Dade & Co.*
Solicitors for respondents: *Taylor & Humbert.*

W. H. G.

BOURGEOIS v. WEDDELL AND COMPANY.

1923 *Dec.* 17.

Arbitration—Evidence—Competency of Arbitrator as Witness before Umpire.

A dispute arose between the buyer and sellers of a quantity of meat as to its quality. The buyer sent K. to inspect and report upon the meat. The dispute having been referred to arbitration, the buyer appointed K. as his arbitrator. The arbitrators having failed to agree upon their award the matter was referred to an umpire, and the buyer then proposed to call K. as a witness before the umpire to prove the state of the meat. The sellers objected to the competency of K. as a witness on the general principle that an arbitrator was disqualified from giving evidence in the arbitration proceedings:—

Held, that as it was a commercial arbitration K. was not disqualified from giving evidence before the umpire, notwithstanding that he had acted as arbitrator.

SPECIAL CASE stated for the opinion of the Court under s. 19 of the Arbitration Act, 1889.

By a contract in writing dated November 9, 1922, the respondents, Weddell & Co., sold to the claimant, Bourgeois, 100 tons of English quality fores and 100 tons of Continental quality hinds, 200 tons in all, Argentine beef at 4¼d. per lb. c.i.f. Antwerp less one per cent. commission to the claimant, shipment to be per *Empire Star*, payment 90 per cent. against

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bill of lading in Antwerp, and the remaining 10 per cent. when the landed weights were ascertained.

In respect of a portion of the beef so sold—namely, 100 tons of Continental quality hinds, a dispute arose between the parties, the claimant alleging that the beef delivered was not in accordance with the contract in that instead of being fresh meat it had apparently been lying for a considerable period in store and was old, mouldy and stale, and claiming damages accordingly.

The dispute was referred to arbitration, the claimant appointing as his arbitrator Mr. Frank Knowles, of the firm of Perfect & Co. of 33-35 Charterhouse Street, London, and the respondents appointing eventually Mr. W. Blankley, of Messrs. Lowther & Blankley, Central Markets, London.

The arbitrators being unable to agree upon their award agreed to appoint as umpire Mr. W. N. Raeburn K.C. This agreement was confirmed by letter of September 13, 1923, from Mr. Knowles to Mr. Blankley in the following terms: "I beg to confirm the agreement arrived at between us that Mr. Norman Raeburn K.C. shall act as umpire in this matter." This agreement was duly notified to the umpire by letter of the same date from Mr. Knowles, which letter added that formal terms of reference were being drawn up and would be sent to the umpire as soon as possible. These formal terms were embodied in an agreement of reference dated October 1, 1923 (such agreement being signed not by the arbitrators but by the claimant and the respondents), which was sent to the umpire in due course by Mr. Knowles.

Mr. Raeburn K.C. accepted the position of umpire and in due course fixed an appointment for proceeding with the reference, and the parties attended before him (both being represented by counsel) for the purpose of calling evidence. The arbitrators were also present. After opening his case counsel for the claimant called as witnesses the claimant and a meat salesman in the employment of Messrs. Perfect & Co., who had inspected the meat at Antwerp on behalf of the claimant. He then called as a witness the said Frank

Knowles, who as hereinbefore stated had been appointed as the claimant's arbitrator. Before Knowles was sworn by the umpire counsel for the respondents objected to the competency of Knowles as a witness, and asked the umpire to state a case for the opinion of the Court on this point. This the umpire agreed to do, and accordingly adjourned the arbitration in order to state this case.

Mr. Knowles, who was a partner in the firm of Perfect & Co., had proceeded to Antwerp on behalf of the claimant for the purpose of inspecting and reporting to the claimant upon the meat which was the subject of the complaint in this reference, and on December 7, 1922, before any reference of the dispute to arbitration, the claimant sent to the respondents a copy of a report on the meat purporting to have been made by Knowles, who stated therein that he had examined a quantity of beef lying in cold store at Antwerp to the account of the claimant ex the *Empire Star*, and proceeded to report adversely upon its condition and quality.

On March 1, 1923, after a considerable exchange of correspondence between the parties, the claimant wrote to the respondents demanding arbitration and appointing as his arbitrator the said Frank Knowles. In response the respondents appointed as their arbitrator one C. MacIntyre Brown, for whom they eventually substituted the said W. Blankley. On March 12, 1923, the respondents in the course of a letter to the claimant wrote as follows: "We would take this occasion of raising a point which has been in our minds regarding your nomination of Mr. Knowles. . . . . It seems to us that Mr. Knowles must be called upon either by you or ourselves as a witness; certainly we do not wish to be deprived of the opportunity of asking any questions which may help to elucidate this disputed matter. Obviously there are objections to one of the witnesses acting also as one of the judges. We think that the best thing would be for us to agree to withdraw our respective nominations and proceed to nominate others. If, however, you would prefer that the nominations already made should

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stand we also are prepared to agree. We cannot do more than leave the decision in your hands."

On March 19, 1923, the respondents wrote to the claimant withdrawing their nomination of the said Brown (to whom objection had been taken by the claimant on the ground of some alleged business connection with the respondents) and substituting the said Blankley, and the letter proceeded as follows: "With reference to our letter of the 12th inst. when we pointed out that we considered it would be better to have Mr. Knowles as a witness rather than as your arbitrator we shall be glad to know if you have considered this point or whether you still adhere to your decision to appoint this gentleman as your arbitrator." The reply of the claimant was as follows: "I am afraid the question of Mr. Knowles coming into the matter as a witness does not come into it at all."

In due course the said Blankley and the said Knowles met in their capacity of arbitrators, but the umpire was not informed as to the nature or course of the discussion between them. The agreement of reference to the umpire above referred to recited that they were unable to agree, and therefore appointed Mr. Raeburn K.C. as umpire.

For the purposes of this case it may be assumed that the claimant in tendering the said Knowles as a witness was proposing to obtain from him evidence of fact as to the state of the beef in dispute.

The claimant contended that the said Knowles was a competent witness of fact and was not disqualified from giving evidence by the fact that he had been appointed as an arbitrator. He further contended that as the arbitrators had disagreed they were functi officio thereafter, and for that reason as competent to give evidence as any other relevant witness. Further, he contended that in any event the umpire was given an express discretion by the said agreement of reference to the umpire and could properly in the exercise of such discretion admit the evidence of the said Knowles.

The respondents contended that by reason of the fact that

the said Knowles had been appointed to act and had purported to act in a judicial capacity he was on general principles disqualified from giving evidence in the arbitration, notwithstanding that he and the other arbitrator had disagreed and had appointed an umpire. Further they contended that on the true construction of the agreement of reference to the umpire the clause by which the umpire was given a discretion as to the admission of evidence did not apply to or cover such evidence as that in dispute, and that even if such clause did apply the umpire would not be exercising his discretion judicially if he admitted the evidence of Knowles.

The questions for the opinion of the Court were: (*a*) In the circumstances hereinbefore stated and apart from any question of discretion arising under the express terms of the agreement of reference of October 1, 1923, is the said Knowles a competent witness in the arbitration? (*b*) If the answer to the foregoing question be in the negative could the umpire nevertheless under the express terms of the agreement of reference properly admit the evidence of Knowles?

Neilson K.C. and *van den Berg* for the claimant. When the arbitrators disagreed and an umpire was appointed the arbitrators became functi officio and Knowles became a competent witness in the proceedings before the umpire of the facts in his knowledge, as he was then in the position of a stranger to the proceedings. Arbitrators frequently give evidence before the Commercial Court, and they are also admissible witnesses in an action to enforce an award.

[They were stopped.]

Jowitt K.C. and *Merlin* for the respondents. It is quite clear since *Duke of Buccleugh* v. *Metropolitan Board of Works* (1) that an arbitrator may be called as a witness in legal proceedings to enforce his award. But there is no reported case in which an arbitrator has given evidence before an umpire in arbitration proceedings in which he was concerned as arbitrator. If a case goes to the Commercial Court after an arbitration it is quite clear that the

(1) (1872) L. R. 5 H. L. 418.

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arbitration is over and the arbitrators functi officio, but in the present case the arbitrators were not functi officio, because if the umpire died or resigned or was removed the arbitrators would have had to appoint another umpire. In *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (1) the Court of Appeal, after deciding that the umpire must be removed for misconduct, ordered that the matter should be remitted to the arbitrators for the appointment of a new umpire. It is therefore clear that the arbitrators in this case had not finally parted with the control of the matter. It is opposed to general principles to allow a man to give evidence in a matter in which he is an arbitrator until he has parted with the control of the matter. No man can be both witness and judge in the same matter. In *Habershon* v. *Troby* (2) a cause had been referred, and the arbitrator, upon inspection of the plaintiff's books and examination of the parties, found that the plaintiff had no cause of action. An action for malicious prosecution was subsequently brought, and it was held that the arbitrator could not be called as a witness to prove those facts. It is clear that a man is disqualified from acting as arbitrator in a dispute in which he is a necessary witness: see *Hogg* v. *Belfast Corporation* (3) and *Bristol Corporation* v. *John Aird & Co.* (4)

[LUSH J. The Court of Appeal held in *French Government* v. *Owners of ss. Tsurushima Maru* (5) that it was not incompatible that an arbitrator in a commercial arbitration should act as advocate for the party appointing him. Where is the difference between that case and that of an arbitrator giving evidence?]

That case depended upon a practice in the City of London, but there is no such custom with regard to arbitrators giving evidence.

[LORD HEWART C.J. I think it is not uncommon for arbitrators in commercial arbitrations to give evidence.]

(1) [1910] 1 K. B. 327, 338.
(2) (1799) 3 Esp. 38.
(3) [1919] 2 I. R. 305, 310.
(4) [1913] A. C. 241.
(5) (1921) 37 Times L. R. 961.

This is a matter in which the arbitrator still occupies a judicial position, because an arbitrator does not cease to be an arbitrator until a final and valid award has been made, and he therefore cannot give evidence in the matter. The proper course would be for the Court to set aside his appointment as arbitrator and then allow him to be called as a witness. The Court has power to set aside the appointment of an arbitrator.

LORD HEWART C.J. This is a case stated for the opinion of the Court under s. 19 of the Arbitration Act, 1889. It is not necessary that I should state the facts, which are set out in the case. The question which emerges is whether in the particular circumstances appearing in the case it was possible to call as a witness in the arbitration a person who had been appointed one of the arbitrators. But it is not necessary to enter into the particular circumstances, because the argument on behalf of the respondents is that, inasmuch as the person referred to had been appointed to act, and had purported to act, in a judicial capacity, he was on general principles disqualified from giving evidence in the course of the arbitration, notwithstanding that he and the other arbitrator had disagreed and had appointed an umpire. Mr. Jowitt, who appears for the respondents, says that he has to support that universal negative proposition based upon general principles. In other words, his clients do not say that this arbitrator may not be called as a witness because of something specially emerging in this case, but that he may not be called as a witness upon the facts in issue in the arbitration, because in no case can an arbitrator be called as a witness.

It was not as an arbitrator that Mr. Knowles obtained his knowledge of the facts to which it is desired that he should depose in the witness-box. The question which the Court has to answer is this: "In the circumstances hereinbefore stated and apart from any question of discretion arising under the express terms of the agreement of October 1, 1923, is the said Knowles a competent witness in the arbitration?" No question arises under the express terms of

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that agreement. Speaking for myself I am not satisfied that Mr. Knowles is disqualified from being called as a witness in the arbitration by the mere circumstance that he was an arbitrator. It is not necessary to speak of a practice in this matter—the word "practice" involves, it may be, rather different considerations; but certainly there are many cases in the books which show that in some circumstances and for some purposes an arbitrator may be called to give evidence about matters relating to the arbitration, and one knows from one's own experience that sometimes an arbitrator is called to give evidence upon matters relating to the issue in controversy between the parties. I am not aware of any rule of law which prevents this arbitrator from being called to give evidence.

LUSH J. I am of the same opinion, although I have come to this conclusion with some hesitation. I think there is very great force in Mr. Jowitt's contention that until a final and valid award has been made an arbitrator does not cease to be an arbitrator, and that he is still clothed with the judicial authority that his appointment as arbitrator vests in him. My reason, however, for coming to the conclusion that in this case this person is not disqualified from giving evidence in the arbitration is this: There is no doubt that the view that is taken as to the position of an arbitrator in commercial arbitrations and the duties which he may allow himself to undertake has altered very much in recent years, and his duties and responsibilities are not viewed now with the same strictness as they were heretofore. An arbitrator may act now in commercial arbitrations as an advocate and as an agent for the party who appoints him. I think that the true view is that when the arbitrators in a commercial arbitration have differed and the umpire has taken upon himself the burden of adjudication, each arbitrator may be and is regarded as no longer acting judicially but as a person who is entitled either to advocate the cause of the party who appointed him or to give evidence in support of that cause. I say I have come to this conclusion with

hesitation, because, speaking for myself, I think it would be very much better if the old rule as to an arbitrator's duty were still adhered to. But as I think that the rules which govern this Court as to this matter are now very clear and settled, I concur in the view expressed by my Lord as being the right view.

SANKEY J. I agree with the judgment of my Lord. Under the modern system of conducting arbitrations great inroads have been made upon what was thought to be the legal practice of arbitration. There is now a difference between arbitrations conducted as legal arbitrations and arbitrations conducted as commercial arbitrations. There are cases in the books which show that in commercial arbitrations an arbitrator may act sometimes as an agent and sometimes as an advocate for the person by whom he is appointed an arbitrator.

With regard to an arbitrator being a witness, certainly in many cases the position is as follows. In the case, say, of perishable goods landed from a vessel on to the quay-side, the arbitrators are selected; they go down and look at the goods, the goods may be then destroyed, and the only persons who can speak as to the quality of the goods are the two arbitrators. They may have acquired their knowledge either before or after they were appointed as arbitrators, but in either case I cannot think it is the law that if they should unfortunately disagree they would not be able to be called as witnesses before an umpire and depose to the facts. It may be regrettable that the strict rule should be relaxed, but I think it is too late to question it now. I am therefore of opinion that the question asked in this case ought to be answered in the affirmative.

Question answered.

Solicitors for claimant: *Swepstone, Stone, Barber & Ellis.*
Solicitor for respondents: *Charles H. Wright.*

R. F. S.

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Jan. 16, 17.

BRANDON AND ANOTHER *v.* OSBORNE GARRETT AND COMPANY, LIMITED, AND OTHERS.

[1922. B. 4861.]

Negligence—Injury without actual Impact—Strain caused to Wife in attempting to rescue Husband from Danger—Remoteness of Damage.

While the plaintiffs, husband and wife, were in a shop as customers a skylight in the roof of the shop was broken, owing to the negligence of contractors engaged in repairing the roof, and a portion of the glass fell and struck the husband, causing him a severe shock. His wife, who was standing close to him at the time, was not touched by the falling glass, but, reasonably believing her husband to be in danger, she instinctively clutched his arm, and tried to pull him from the spot. In doing this she strained her leg in such a way as to bring about a recurrence of thrombosis. In an action to recover damages from the contractors:—

Held, that the husband was entitled to damages, and that the wife was also entitled to damages, inasmuch as what she did was, in the circumstances, a natural and proper thing to do.

Jones v. *Boyce* (1816) 1 Stark. 493 followed.

Woods v. *Caledonian Ry. Co.* (1886) 13 R. 1118; *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1897) 24 R. 1001; and *Eckert* v. *Long Island Railroad Co.* (1871) 43 N. Y. 502 referred to.

ACTION tried by Swift J.

The plaintiffs, husband and wife, claimed damages for injuries sustained by them while they were in a shop occupied by the first defendants.

On July 25, 1922, the plaintiffs were shopping in the premises in question. On that date the second defendants, George Parker & Sons, Ld., were carrying out repairs to the roof of the department to which the plaintiffs were directed. While the plaintiffs were in that department a portion of the skylight, forming part of the roof, fell, and a piece of glass struck the male plaintiff, and although it did not cut him it caused him a severe shock. He was naturally of a nervous disposition, and had suffered for some years from neurasthenia, and in consequence he suffered a greater shock than a normal person would have done. At the moment when the male plaintiff was struck by the falling glass his wife was standing quite close to him. She was not struck or touched by the

falling glass, but on seeing it falling she immediately and instinctively put out her hand and clutched her husband's arm and tried to pull him away from the spot. In this effort to pull her husband out of danger, which she reasonably believed to exist, she strained her leg in such a way as to bring about a recurrence of thrombosis from which she had at one time suffered, but from which she had been free for some years.

The judge found as a fact that the fall of glass on to the male plaintiff was due to the negligence of the second defendants' workmen in allowing a piece of wood to fall on to the glass roof, which they had not protected, as they ought to have done. The judge further found that the male plaintiff's injuries were caused by that negligence, and therefore that he was entitled to damages.

Before the trial the plaintiffs intimated that they would not claim damages against the first defendants, but the action was not discontinued against them.

Morle and *Groves* for the plaintiffs.

Liversidge for the first defendants.

Compston K.C. and *Harold Simmons* for the second defendants. As to the claim of the female plaintiff, it is submitted that it is not maintainable. She was not touched by the falling glass, was never in danger, and was under no reasonable apprehension of danger, and her injury is too remote a consequence of the alleged negligence. There is no reported authority upon the point, but the unreported case of *Smith* v. *Johnson & Co.* (1), referred to by Wright J. in *Wilkinson* v. *Downton* (2), supports the defendants' contention. Wright J. said: "In *Smith* v. *Johnson & Co.*, decided in January last, Bruce J. and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence."

(1) Unreported. (2) [1897] 2 Q. B. 57, 61.

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In *Sharp* v. *Powell* (1) Bovill C.J. said that, generally speaking, a person who commits a wrongful act "is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action." Here there is no evidence that the alleged negligent workman knew that a man under the skylight had his wife standing near him and ought to have supposed that if glass fell the wife would do something which might result in injury to her. If a man is thrown into the sea owing to the negligence of those on board the ship in which he is a passenger, and another person jumps in to save him and as a consequence of doing so contracts pneumonia, he could not recover damages from the shipowners. Like the female plaintiff in this case, he voluntarily encountered the peril.

[SWIFT J. There appears to be direct authority in the Scottish and American Courts in favour of the female plaintiff's contention.]

Those cases are inconsistent with *Sharp* v. *Powell* (2), and should not be followed. They are clearly not binding authorities.

[They also cited *Clinton* v. *Lyons & Co.* (3)]

Groves in reply. The causa causans of the mischief was the negligence of the second defendants' workmen: *Hill* v. *New River Co.* (4) But for that negligence the female plaintiff would have done nothing. It is not correct to say that she never was under a reasonable apprehension of danger. In

(1) (1872) L. R. 7 C. P. 253, 258. [But see *Polemis' Case* [1921] 3 K. B. 560.—F. P.]
(2) L. R. 7 C. P. 253.
(3) [1912] 3 K. B. 198.
(4) (1868) 9 B. & S. 303.

Dulieu v. *White & Sons* (1), where it was held that the wife of a publican who was serving behind the bar was entitled to maintain an action in respect of a nervous shock occasioned by fright, unaccompanied by actual impact, the shock being caused by the defendants' servants negligently driving a van into the public-house, Kennedy J. said (2): "I should not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by horror or vexation arising from the sight of mischief being threatened or done either to some other person, or to her own or her husband's property, by the intrusion of the defendants' van and horses." In this case the female plaintiff had not merely the sight of mischief, she feared for herself, and, further, she acted reasonably in trying to save her husband from further danger. If a person is guilty of negligence causing danger to a person he must be taken to anticipate that others will come forward and endeavour to rescue the person in danger.

[He referred to Pollock on Torts, 12th ed., pp. 38, 39.]

SWIFT J. In this case the two plaintiffs claim damages for personal injuries which each of them sustained, and sustained, it is alleged, through the negligence of the defendants, Parker & Sons, while they by their servants were working on the premises of the first defendants, Osborne Garrett & Co. [His Lordship stated the facts and continued:] It is argued for the defendants, Parker & Sons, that the female plaintiff is not entitled to recover, because nothing was done to her by the negligent act of the defendants' servants, her injury being caused by her intervening to pull her husband out of the danger she thought was threatening him. No danger, it is said, was threatening her. If she had been trying to escape from danger threatening herself it is not disputed that she would have been entitled to recover, but it is said that what brought about her injury was her own voluntary

(1) [1901] 2 K. B. 669. (2) [1901] 2 K. B. 676.

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act in trying to assist her husband, whom she believed to be in danger. I have come to the conclusion that she is entitled to damages, notwithstanding that the injury was caused by her own intervention to save her husband, unless, indeed, it can be shown that her act amounted to contributory negligence. In such circumstances as these it would be for the jury to say whether, where the primary cause of the injury was the negligence of the defendants in breaking the glass roof so that portions of it fell on the male plaintiff and close to her, the injury to her leg was caused by an improper act of hers which contributed to the mischief. If she did something which a reasonable person in the circumstances ought not to have done she would not be entitled to damages, but if what she did was done instinctively and was in the circumstances a natural and proper thing to do, I think she is entitled to recover.

In my opinion this case is covered in principle by the statement of the law in *Jones* v. *Boyce*. (1) Lord Ellenborough there in substance directed the jury that if a person is placed by the negligence of the defendant in a position in which he acts under a reasonable apprehension of danger and in consequence of so acting is injured, he is entitled to recover damages, unless his conduct in all the circumstances of the case amounts to contributory negligence. If a person is not to be held guilty of contributory negligence because he, acting instinctively for his own preservation, does that which a reasonable man under those conditions would do, I cannot see why he should be any more held to be guilty of contributory negligence if he does his instinctive act for the preservation of his wife or child or even of a friend or stranger. Questions of this kind have arisen in other countries, and the cases there may properly be looked at for the purpose of seeing how they have been dealt with; and although those decisions are not binding upon me I am glad to find that they confirm the view which I hold is the law of England. In the Scottish case of *Woods* v. *Caledonian Ry. Co.* (2) a young woman was killed while endeavouring to drag a companion out of danger from an

(1) 1 Star. 493.

(2) 13 R. 1118; 23 S. L. R. 798.

approaching train. Counsel for the railway company asked the judge to direct the jury that if the young woman went into a seen danger she was not entitled to recover damages, even if her object was to rescue her companion. This direction the judge refused to give, and exception was taken to his refusal. On a bill of exceptions it was held that the question what the object of the young woman was in being upon the line, and whether she was guilty of contributory negligence in being there, were not matters for direction in point of law, but were properly left for the consideration of the jury. A later case in the Scottish Courts was *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1) There damages were claimed from the defendant company for injury received by a boy while in their employment. It was averred that while the boy and a man, also in the company's employment, were standing on a stationary truck trimming coal, the boy observed an uncontrolled waggon approaching them with great speed on the same line of rails; that he in a moment of hurry and confusion incident to his surroundings and the extreme danger to himself and his fellow-workman jumped from the stationary truck, and seizing a wooden pit prop, attempted to stop the approaching waggon by inserting the prop between the spokes of one of the wheels; that the waggon was stopped within three or four feet of the stationary truck, but by reason of the sudden jerk caused by the stopping, the boy was thrown down and received serious injury; and that but for the insertion of the prop the two waggons would have come into violent collision, which would have been attended with great danger to the boy and his fellow-workman. There was a relevant averment of fault on the part of the company or those for whom they were responsible in allowing the waggon to run down under no control and at an improper rate of speed. It was there held by a majority of the judges that an issue should be allowed for the trial of the action, the three judges forming the minority being of opinion that the action was irrelevant, as the pursuer's averments showed that the boy, having got out of danger,

(1) 24 R. 1001; 34 S. L. R. 533.

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voluntarily performed an act outside the scope of his employment which resulted in his injury. There, it will be observed, it was left to the jury to say whether the boy in doing what he did, in the circumstances, was doing something which should be imputed to him as negligence contributing to the accident, which was caused in part and primarily by the company's negligence.

In the American case of *Eckert* v. *Long Island Railroad Co.* (1) the facts were that the plaintiff's husband, seeing a little child on the railway track and a train swiftly approaching, ran on to the track and threw the child clear, but was himself caught by the train and killed. The jury found negligence on the part of the railway company. It was contended that the deceased's negligence contributed to the injury. The majority of the Court held that the deceased " owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself." Two members of the Court dissented on the ground that " principles of law cannot yield to particular cases " and that the act of the deceased was " a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred." I do not go as far as the majority of the Court there did in holding that there is a legal duty upon a person to save life if he can, although it is to be observed that Cockburn C.J. in *Scaramanga & Co.* v. *Stamp* (2) said that " the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity." I do not say that there is a legal duty to risk one's own life to save that of a stranger; indeed, I should unhesitatingly say there was not, but there may be a nearer approach to such a duty to save the life of one's child or wife or husband. In any event there may be a moral obligation which would so act upon the mind of any ordinary reasonable man that he would instinctively rush to the assistance of one in immediate peril through the negligent act of a third party. If he were injured by that negligent act of the third party and sued him, I think the real question

(1) 43 N. Y. 502; 3 Am. Rep. 721. (2) (1880) 5 C. P. D. 295, 304.

would be for a jury to decide, and that question would be—was the plaintiff in all the circumstances guilty of contributory negligence ?

Without, however, determining these questions, it seems to me that where a person sustains injury through a combination of acts, some done by the defendants and some by himself, it is for the jury to say, having regard to the whole of the circumstances, whether (1.) the injury is the natural and probable consequence of the defendants' act, and (2.) whether the plaintiff has been guilty of contributory negligence. If in this case the female plaintiff had been standing in a place of perfect safety, and saw, as she says she did (although in this I think she exaggerated), the "glass raining down upon her husband," and had time to think what was the wisest thing to do, it might possibly be said that she was guilty of negligence by going into the danger ; but, having regard to the place she was in and the frightening nature of the accident (for it was undoubtedly frightening even for people of steady nerves and strong legs), I think that acting instinctively as she did in clutching her husband's arm and trying to drag him out of danger, she did nothing wrong or anything that can be called contributory negligence. I therefore find in favour of the plaintiffs, and I assess the damages payable to the husband at 35*l.* and those payable to the wife at 25*l.*

Judgment for plaintiffs.

Solicitors for plaintiffs : *Stanley Robinson & Commin.*
Solicitors for both defendants : *Leader, Plunkett & Leader.*

J. S. H.

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Nov. 6;
Dec. 17.
1924
Jan. 25.

SMITH, APPELLANT *v.* FENNELL, RESPONDENT.

Licensing—Refreshment Houses—Hours for closing—Provision for, inoperative—Public House Closing Act, 1864 (27 & 28 *Vict. c.* 64), *s.* 5—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 11—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 54, *Sixth Schedule—Licensing Act*, 1921 (11 & 12 *Geo.* 5, *c.* 42), *ss.* 1, 2, 3, 4, 6, *First Schedule.*

By s. 5 of the Public House Closing Act, 1864, as amended by s. 11 of the Licensing Act, 1874, "no person . . . . shall open or keep open any refreshment house, or sell or expose for sale or consumption in any refreshment house any refreshments or any article whatsoever between the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail, situate in the same place as such refreshment house, are required by law to be closed, and four o'clock in the morning."

By s. 54 of the Licensing (Consolidation) Act, 1910: "All premises in which intoxicating liquors are sold by retail shall be closed during the hours specified in the Sixth Schedule to this Act (in this Act referred to as general closing hours)."

The Licensing Act, 1921, by ss. 1 and 2, introduced a system of "permitted hours" for the sale of intoxicating liquors in licensed premises, and by s. 4 prohibited persons selling intoxicating liquors except during those hours. Sect. 6, sub-s. 1, provides that "the foregoing provisions of this Act shall have effect in lieu of s. 54 of, and the Sixth Schedule to, the Licensing (Consolidation) Act, 1910. . . . . " Sub-s. 2 repealed s. 54 of, and the Sixth Schedule to, the Act of 1910.

The appellant was convicted under s. 5 of the Public House Closing Act, 1864, of keeping open a refreshment house for the sale of refreshments during part of the time the premises were required to be closed:—

Held, quashing the conviction, that since the passing of the Licensing Act, 1921, there are now no hours during which "premises licensed for the sale of intoxicating liquors" are "required to be closed," and that therefore s. 5 of the Public House Closing Act, 1864, as amended by s. 11 of the Licensing Act, 1874, has become inoperative.

CASE stated by justices for the county of Derby.

The appellant, Henry Charles Smith, was summoned before a Court of summary jurisdiction at Alfreton by the respondent, George Fennell, superintendent of police, and charged for that he, being a refreshment house keeper, did on June 23, 1923, unlawfully keep his premises open for the sale of refreshments during part of the time that the said premises were required to be closed. The information was laid under s. 5 of the Public House Closing Act, 1864.

At the hearing on July 18, 1923, it was proved or admitted

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that the appellant had sold refreshments about 11.30 P.M. on the evening of Saturday, June 23, 1923; that he was a licensed refreshment house keeper; and that the permitted hours for the sale of intoxicating liquors as respects licensed premises in the same place in which such refreshment house was situate were on weekdays between 11 A.M. and 3 P.M. and between 6 P.M. and 10 P.M.

On behalf of the appellant it was submitted that there were now no closing hours for refreshment houses, and that by virtue of the provisions of s. 6 of the Licensing Act, 1921, which repealed s. 54 of the Licensing Act, 1910, which regulated the closing hours for premises in which intoxicating liquors are sold by retail, the provisions of s. 5 of the Public House Closing Act, 1864, had become inoperative, and that the facts disclosed no offence.

The justices adjudged the appellant guilty of the offence charged and convicted him.

The Court was asked to say whether the justices were right in so adjudging, and whether the conviction should stand or be quashed.

Marshall Freeman for the appellant. The question in this case is whether refreshment house keepers who are not licensed to sell intoxicating liquors are entitled to keep their premises open at all hours during the day and night. By s. 6 of the Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), all houses kept open for public refreshment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of intoxicating liquors shall be deemed refreshment houses, and the owner, tenant or occupier thereof shall be required to take out an excise licence to keep a refreshment house. The Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), by s. 8 substituted the hour of ten for nine in the former Act. The Public House Closing Act, 1864 (27 & 28 Vict. c. 64), by s. 5 provided that no person should open or keep open any refreshment house, or sell or expose for sale or consumption in any refreshment house any refreshments or any

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article whatsoever between the hours of 1 and 4 o'clock in the morning. The Public House Closing Act, 1865 (28 & 29 Vict. c. 77), by s. 2 gave power to licensing justices to grant a licence to the keeper of a refreshment house, whose place of business was in the immediate neighbourhood of a public market or of the place where persons follow any lawful trade or calling, exempting him from the provisions of the before mentioned Act between the hours of two and four in the morning. This Act was repealed by the Licensing Act, 1872, as regards houses selling intoxicating liquor, but it is still in force as to refreshment houses. The Licensing Act, 1874 (37 & 38 Vict. c. 49), by s. 11 amended s. 5 of the Public House Closing Act, 1864, by substituting therein "for the hour of one o'clock in the morning the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment house are required to be closed." Therefore after the passing of that Act no refreshment house could be open between the closing hours for licensed houses and 4 A.M. The Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), provided by s. 54 that "all premises in which intoxicating liquors are sold by retail shall be closed during the hours specified in the Sixth Schedule to this Act (in this Act referred to as general closing hours)." The Sixth Schedule provided that the general closing hours for premises not in the metropolis or metropolitan police district or in a town or populous place should be on Saturday night from ten o'clock until half an hour after noon on the following Sunday. The appellant in the present case sold refreshments at 11.30 P.M. on Saturday night. The Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), by ss. 1 to 6 made a complete alteration in the licensing law; it abolished closing hours for licensed premises and provided that intoxicating liquor might only be sold or supplied in any licensed premises during certain hours called "permitted hours," and prohibited the sale or consumption of intoxicating liquor in such premises except during the permitted hours. The Act provided in s. 6 that "the foregoing

provisions of this Act shall have effect in lieu of s. 54 of, and the Sixth Schedule to, the Licensing (Consolidation) Act, 1910, but (subject as hereinafter provided in this Act), all the other provisions of that Act with respect to closing hours shall continue in force." When the subsequent provisions of the Act are looked at it will be seen that the latter part of the section as to all the other provisions of the Act of 1910 with respect to closing hours continuing in force relate to ss. 55, 57, 58, 59, 63 and 84, of the Act of 1910. Sect. 54 of the Act of 1910 is expressly repealed by s. 6, sub-s. 2 of, and the First Schedule to, the Licensing Act, 1921. That would not have been done if it had not been intended to abolish closing hours for licensed premises. Now refreshments other than intoxicating liquors can be obtained in licensed premises at any time even outside permitted hours. Sect. 5 of the Public House Closing Act, 1864, as to the closing of refreshment houses, although still in force, has now become inoperative, because it depends for its efficacy upon there being closing hours for licensed premises, and since the coming into operation of the Licensing Act, 1921, there are no closing hours for licensed premises: see Paterson's Licensing Laws, 33rd ed., notes on pp. 328, 330, 331, 339, 343.

[*Harries* v. *Thomas* (1) was also cited.]

J. G. Trapnell for the respondent. The conviction was right and ought to be upheld. Sect. 11 of the Licensing Act, 1874, which amends s. 5 of the Public House Closing Act, 1864, as to the hour of closing refreshment houses and provides that no refreshment house shall be kept open or refreshments sold or exposed for sale or consumption in any such refreshment house between the closing hour for licensed premises and 4 A.M. is expressly kept alive by the Seventh Schedule to the Licensing Act, 1910. The provision in s. 11 that refreshment houses shall not be open during the hours licensed premises are required to be closed means during the hours licensed premises are closed for the sale or consumption of intoxicating liquors. Licensed houses have never been required to be closed altogether, but only closed for the

(1) (1917) 86 L. J. (K. B.) 812.

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sale of intoxicating liquors. It is clear from s. 61 of the Licensing Act, 1910, that the provisions in s. 54 that licensed premises should be closed during the hours specified in the Schedule meant that they should be closed for the sale of intoxicating liquor. The Licensing Act, 1921, made a change in the law by providing that intoxicating liquors might only be sold on licensed premises during certain permitted hours, instead of requiring licensed premises to be closed for the sale of intoxicating liquors during certain hours. "Permitted hours" are defined in s. 20 as "the hours on any day during which intoxicating liquor may be sold or supplied" in any licensed premises or club. The inference is that all other hours are prohibited hours for the sale of intoxicating liquor. The offence contemplated by the statute is the selling of intoxicating liquors on licensed premises otherwise than during permitted hours. The result is that refreshment houses must be closed during the hours when it is not permitted to sell intoxicating liquors in licensed premises, even though refreshments other than intoxicating liquors may be sold on licensed premises during those hours. The appellant in order to succeed must show that s. 5 of the Public House Closing Act, 1864, as amended by s. 11 of the Licensing Act, 1874, has been repealed by implication, as it has not been expressly repealed. It was laid down in *Kutner* v. *Phillips* (1) that "a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, 'Leges posteriores contrarias abrogant,' applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied." The change in the law through making certain hours permitted hours for the sale of intoxicating liquor in licensed premises instead of requiring licensed houses to be closed during certain hours for the sale of intoxicating liquor is not such a change as to involve the implied repealing of the law with regard to refreshment houses being

(1) [1891] 2 Q. B. 267, 271.

closed during the hours licensed houses are required to be closed. The Legislature had to fix the hours during which intoxicating liquors might be sold on licensed premises. This is done equally well by specifying the hours during which intoxicating liquors are permitted to be sold in licensed houses as by specifying the hours during which licensed houses are required to be closed. There is no inconsistency between the Public House Closing Act of 1864, as amended by the Licensing Act of 1874 and the Licensing Act, 1921, which substituted permitted hours for closing hours, the inference from which is that all hours other than permitted hours are closing hours. The objects of the Licensing (Consolidation) Act, 1910, and the Licensing Act, 1921, are the same. Although the present legislation does not expressly require licensed houses to be closed, yet one can predicate with certainty the hours during which licensed houses must be closed for the sale of intoxicating liquors. The Licensing Act, 1921, by s. 6 expressly provided that all the other provisions of the Licensing (Consolidation) Act, 1910, with respect to closing hours shall continue in force.

LORD HEWART C.J. We do not require a reply, as we think the contention of Mr. Marshall Freeman is right. The appeal will therefore be allowed and the conviction quashed, but as it is a very important matter we will put our judgment into writing.

Cur. adv. vult.

1924. Jan. 25. The judgment of the Court (LORD HEWART C.J., LUSH and SANKEY JJ.) was read by

LORD HEWART C.J. This was a case stated by the justices for the county of Derby (Alfreton Sessional Division). The appellant, who is a licensed refreshment house proprietor, was charged with having unlawfully kept his premises open for the sale of refreshments during part of the time that they were required to be closed. The information was laid under s. 5 of the Public House Closing Act, 1864. By that section it was enacted that "no person within the limits of

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this Act [that was the metropolis] shall open or keep open any refreshment house, or sell or expose for sale or consumption in any refreshment house any refreshments or any article whatsoever between" the hours of one and four o'clock in the morning. This section was amended by s. 11 of the Licensing Act, 1874, which substituted for those hours the following times: "between the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment house are required to be closed, and four o'clock in the morning." A penalty was imposed on any person acting in contravention of the section. This Act was made to apply throughout England and Wales.

The appellant was proved to have kept open his refreshment house and sold refreshments at 11.30 P.M. on Saturday, June 23, 1923. The permitted hours for the sale of intoxicants in licensed houses in that district on weekdays were 11 A.M. to 3 P.M. and 6 P.M. to 10 P.M.

The justices convicted the appellant subject to a case. The case was argued before us, and at the close of the arguments we allowed the appeal and ordered the conviction to be quashed. We however thought it desirable to put our judgment into writing, as the case is of considerable public importance.

At the time when the Acts of 1864 and 1874 were passed and until the Licensing Act, 1921, came into operation all premises licensed for the sale by retail of intoxicants were required by law to be closed during certain hours. The closing of licensed refreshment houses was not dependent as regards hours on the closing of houses licensed for the sale of intoxicants until the Act of 1874 fixed the closing hours of the one by relation to the closing hours of the other. The Refreshment Houses Act, 1860, s. 6, had enacted that "all houses, rooms, shops or buildings kept open for public refreshment, resort and entertainment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively, shall be deemed refreshment houses

within this Act," and it then proceeds to impose on the "resident, owner, tenant or occupier thereof" the obligation of taking out a licence to keep a refreshment house. The hour of nine was altered to ten by the Revenue (No. 2) Act, 1861, s. 8.

Various changes were made in the law with regard to the regulation of houses licensed for the sale of intoxicants which it is not necessary for the purpose of this case to refer to. In 1910 the Licensing (Consolidation) Act, 1910, was passed. That Act amended and consolidated the law as to the closing of premises licensed for the sale of intoxicants. Sect. 54 enacted that "subject to the provisions of this Act all premises in which intoxicating liquors are sold by retail shall be closed during the hours specified in the Sixth Schedule to this Act (in this Act referred to as general closing hours)." Then follow a group of sections empowering local authorities to exempt premises from, and to vary, the closing hours in certain cases, and enabling justices to grant early-closing licences. Sect. 63 enabled justices in case of riot or tumult to order every holder of a justices' licence to "close his premises."

So matters remained until 1921, when the law with regard to closing houses licensed for the sale of intoxicants was entirely altered by the Licensing Act, 1921. By that Act "closing hours" were abolished and a system of "permitted hours" for the sale of intoxicants was adopted. Sects. 1 and 2 define what those hours are to be in different districts on weekdays and Sundays, Christmas Day and Good Friday. Sect. 3 provides for extending the "permitted hours." Sect. 4 prohibits any person from selling, etc., intoxicants except during those hours. Then comes s. 6, which is as follows: sub-s. 1: "The foregoing provisions of this Act shall have effect in lieu of s. 54 of, and the Sixth Schedule to, the Licensing (Consolidation) Act, 1910, but (subject as hereinafter provided in this Act), all the other provisions of that Act with respect to closing hours shall continue in force." Sub-s. 2: "The provisions of the Licensing (Consolidation) Act, 1910, specified in Part I. of the First Schedule to this Act shall be repealed, and the provisions of that Act

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specified in Part II. of that Schedule shall have effect subject to the modifications provided for in that Part of that Schedule." Part I. of the First Schedule enumerates the list of repealed sections. It includes s. 54 and the whole of the Sixth Schedule to the Act of 1910, which sets out the general closing hours. Part II. provides that with regard to certain other sections the reference in them to the provisions of the Act of 1910 relating to general closing hours " shall be deemed to be a reference to the provisions of this Act as to permitted hours." Sect. 63, which empowered justices in time of riot or tumult to order every holder of a justices' licence to close his premises, is left untouched.

It is clear, therefore, that if we are to interpret s. 5 of the Public House Closing Act, 1864, as amended by s. 11 of the Licensing Act, 1874, according to its plain language, the enactment against opening or keeping open refreshment houses and against selling refreshments therein during certain hours has become inoperative. There are no hours now during which " premises licensed for the sale of intoxicating liquors by retail " are " required to be closed." The conditions which prevailed when the earlier Acts were passed have ceased to exist. We were pressed by Mr. Trapnell, who argued the case on behalf of the respondent, to treat s. 11 of the Licensing Act, 1874, as if it had said " the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail are required to be closed for the sale of such intoxicating liquors." We cannot adopt that contention. The Legislature has deliberately repealed s. 54 of the Act of 1910 and the other sections and the Sixth Schedule which refer to " closing hours," and carefully substituted a different method of regulating the sale of intoxicants by reference to " permitted hours." It has said in effect that there shall in future be no hours during which licensed premises are required by law to be closed, and it has treated the alteration in the law as an alteration of substance. To accede to the argument on behalf of the respondent would involve our holding that, notwithstanding the elaborate care that has been taken to abolish closing hours, premises licensed

for the sale of intoxicants by retail are still by law required to be closed. Moreover if we were to accede to the argument we should be creating, or it may be more correct to say perpetuating, this serious anomaly. The normal time in the evening at which "permitted hours" cease is ten o'clock. That was the time at which the justices held on the evidence in this case that the appellant ought to have closed his refreshment house. But a licence is required only if a refreshment house is kept open after ten o'clock. The appellant's licence therefore was a licence to do that which on the respondent's contention the law prohibited him from doing. If a refreshment house must be closed at ten o'clock it follows that the licence is contradicted and neutralized.

For these reasons we are of opinion that no offence was committed by the appellant, and that this conviction was wrong.

Appeal allowed.
Conviction quashed.

Solicitor for appellant: *R. A. Young, Nottingham.*

Solicitors for respondent: *Speechly, Mumford & Craig, for W. M. Wilson, Alfreton.*

R. F. S.

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Jan. 14, 15, 16, 23.

PRAGER *v.* BLATSPIEL, STAMP AND HEACOCK, LIMITED.

[1921. P. 1032.]

Sale of Goods—Impossibility of immediate Delivery—Impossibility of communicating with Buyer—Resale by Sellers—Repudiation of Resale by original Buyer—Agency of Necessity.

The doctrine of agency of necessity is not confined to cases of carriers of goods or of the acceptor of a bill of exchange for the honour of the drawer, but extends to a case where the sellers of goods to a purchaser abroad to whom, owing to war conditions, they cannot deliver them and with whom they are unable to communicate, resell the goods, purporting to act as the original purchaser's agents of necessity, if in the circumstances of the case there is an actual commercial necessity to sell the goods and the agents act bona fide:—

But, *held*, on the facts of the case, that there was no such necessity and that the sellers had not acted bona fide, and were not, therefore, agents of necessity to resell the goods.

ACTION tried before McCardie J.

The plaintiff was a fur merchant carrying on business in Bucharest, and the defendants were fur merchants in London.

In 1915 and 1916 the defendants as agents for the plaintiff purchased for the plaintiff skins to the value of 1900*l.*, to be despatched to Roumania or as the plaintiff might direct. Owing to the occupation of Roumania by the German forces it became impossible for the defendants to send the skins to the plaintiff or to communicate with him. The plaintiff paid for the skins and performed all the obligations of his contract. In 1917 and 1918 the defendants sold the plaintiff's skins, which had gone up in value. After the armistice in November, 1918, the plaintiff wrote to the defendants asking them to send him the skins. The defendants replied: "We thought it best to realise your goods as they were getting stale and there was no knowing how long these troublous times might last." The plaintiff repudiated the sale by the defendants, and brought this action claiming damages for the conversion of the skins.

It was contended by the defendants that they were the

plaintiff's agents of necessity to sell the skins. The plaintiff contended that the doctrine of agency of necessity did not apply to the present case, not being the case of a carrier or that of the acceptor of a bill of exchange for the honour of the drawer. He also contended that the facts of the present case did not show any necessity to sell, and that the defendants had not acted bona fide.

The further facts appear from the judgment.

Greaves-Lord K.C. and *W. R. Howard* for the plaintiff.
Patrick Hastings K.C. and *W. van Breda* for the defendants.

Cur. adv. vult.

Jan. 23. McCARDIE J. read the following judgment: This case raises several points of law and fact. The broad circumstances are these. The plaintiff deals in furs, and lives in Bucharest, being furrier to the Roumanian Court. The defendants are fur merchants in London, and act as agents in the buying and dressing of skins. For some years before the war they had been agents for the plaintiff, and they continued so to act after the outbreak of hostilities in August, 1914. In 1915 and 1916 the defendants purchased for the plaintiff a large number of skins, including skunk skins, leopard cat skins, and marten, opossum, ermine and silver fox skins. The total cost of the goods was nearly 1900*l.* In substance the plaintiff had paid the defendants the whole of that amount, and in 1916 all that the plaintiff owed the defendants was about 380*l.* for dressing a number of skins purchased. The defendants were bound to despatch the goods, when required to do so, to the plaintiff in Roumania or as he might direct. War conditions gradually rendered transport difficult, and postal or telegraphic communication equally difficult. In 1915 the defendants endeavoured to forward some of the skins to Roumania, as asked for by the plaintiff. The skins were returned by the postal authorities after many wanderings. At the end of 1916 the German forces entered and dominated Roumania. Thenceforward Roumania became, for practical

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purposes, an enemy country. As from December, 1916, it is agreed that it was impossible to send any goods to the plaintiff, and also impossible to communicate with him in any way.

In the autumn of 1917 the defendants began to sell the plaintiff's goods. They were sold in different lots onwards to September, 1918, and all were sold save a few of the silver fox skins. In November, 1918, the armistice was declared, and thereafter facilities for communication between London and Roumania arose. On January 21, 1919, the plaintiff wrote to the defendants: "I hope that all our merchandise is in good condition and I request you to be so good as to take the necessary measures for the shipment of the same." On February 12, 1919, the defendants acknowledged the letter and said: "We thought it best to realise your goods as they were getting stale and there was no knowing how long these troublous times might last." The plaintiff replied expressing his astonishment and added: "I bought the merchandise under the then existing difficulties and unfavourable conditions in order to be supplied with goods upon the return of normal conditions." He repudiated the action of the defendants, and demanded back his goods, and, after further correspondence, brought this action for conversion and for other relief. It is admitted that the defendants had no contractual right to sell the goods. They justified their acts on the ground only that they were agents of necessity.

Now the first question of law is this: Can the facts as I have outlined them afford a possible legal basis on which to rest an agency of necessity? The defendants say yes; the plaintiff says no. The doctrine of agency of necessity doubtless took its rise from marine adventure. Hence the numerous decisions set out in Carver's Carriage by Sea, 6th ed., s. 294, and following sections. The substance of the matter as stated in that book is that in cases of necessity the master of a ship has power and it is his duty to sell the goods in order to save their value or some part of it: see s. 297. In *Hawtayne* v. *Bourne* (1) Parke B. expressed a view that

(1) (1841) 7 M. & W. 595.

agency of necessity could not arise save in the case of a master of a ship and of the acceptor of a bill of exchange for the honour of the drawer. (1) He added (2) that: "The authority of the master of a ship rests upon the peculiar character of his office." In *Gwilliam* v. *Twist* (3) Lord Esher said: "I am very much inclined to agree with the view taken by Eyre C.J. in the case of *Nicholson* v. *Chapman* (4), and by Parke B. in the case of *Hawtayne* v. *Bourne* (1), to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer." If the dicta I have cited be correct then the defendants in the case now before me cannot justify their acts of sale. In my humble opinion, however, those dicta are not the law to-day. In *Great Northern Ry. Co.* v. *Swaffield* (5), more than twenty years before the dictum of Lord Esher, the Court of Exchequer (Kelly C.B., Pigott, Pollock and Amphlett BB.) had applied the doctrine of agency of necessity to a land carrier. They applied to him the principle of the shipping cases. I think too that *London and North Western Ry.* v. *Duerden* (6) is in substance an application of the same principle. In *Sims & Co.* v. *Midland Ry. Co.* (7)—the sale of butter case—the Divisional Court (Ridley and Scrutton JJ.) again recognized that the principle of the shipping cases might apply to land carriers. See also Macnamara on Carriers by Land, 2nd ed., art. 189 (n.). In *Springer* v. *Great Western Ry.* (8) the Court of Appeal approved the principle stated in *Sims' Case.* (7)

The decisions I have already cited show that the dictum of Lord Esher in *Gwilliam* v. *Twist* (3) is not the law of to-day. Agency of necessity is not confined to shipmaster cases and to bills of exchange. I may next point out that in the well-known judgment of the Court of Appeal in *De Bussche* v.

(1) 7 M. & W. 599.
(2) Ibid. 600.
(3) [1895] 2 Q. B. 84, 87.
(4) (1793) 2 H. Bl. 254.
(5) (1874) L. R. 9 Ex. 132.
(6) (1916) 32 Times L. R. 315.
(7) [1913] 1 K. B. 103.
(8) [1921] 1 K. B. 257.

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Alt (1) the Court stated that unforeseen emergencies may arise which impose on an agent the necessity of employing a substitute, and the authority to do so which he would not otherwise possess. That case related to the sale of a ship in the East, and it shows an appreciation by the Court of Appeal in 1878 of a principle which, in its application, could not be confined to carriers or acceptors of bills of exchange. The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law. A dozen decisions could be cited to illustrate the remarks I have just made. I mention only the words of Bankes L.J. in *Rex* v. *Electricity Commissioners* (2) when he said: "It has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances." I respectfully agree, and I venture to add that it would be well if those words were more often remembered and applied. In my view there is nothing in the existing decisions which confines the agency of necessity to carriers whether by land or sea, or to the acceptors of bills of exchange. The basic principle I think is a broad and useful one. It lies at the root of the various classes of cases of which the carrier decisions are merely an illustration. When carefully examined, such cases as *Gwilliam* v. *Twist* (3) and *Harris* v. *Fiat Motors* (4) show, by implication, a recognition of a wide rule as to agency of necessity. See also Bowstead on Agency, 6th ed., art. 8, p. 15, and the illustration thereto, *Beard* v. *London General Omnibus Co.* (5) and *Bank of New South Wales* v. *Owston.* (6)

The view I am now expressing is strikingly supported by

(1) (1878) 8 Ch. D. 286.
(2) (1923) 39 Times L. R. 715, 718; [1924] 1 K. B. 171, 192.
(3) [1895] 2 Q. B. 84.
(4) (1907) 23 Times L. R. 504.
(5) [1900] 2 Q. B. 530, 532.
(6) (1879) 4 App. Cas. 270, 290–1.

the lucid treatise of Story on Agency, 9th ed., ss. 69, 85, 141, 193 and 237, and the notes. The gist of the observations of the learned author appears in s. 141, where he says: "Although the powers of agents are, ordinarily, limited to particular acts; yet . . . . extraordinary emergencies may arise, in which a person, who is an agent, may, from the very necessities of the case, be justified in assuming extraordinary powers; and . . . . his acts, fairly done, under such circumstances, will be binding upon his principal." See also Chitty's Commercial Law (1824), vol. iii., p. 218.

I see nothing which as a matter of strict law prevents the defendants here from seeking to rely on the doctrine of agency of necessity. In *Tetley* v. *British Trade Corporation* (1) Bailhache J. applied the doctrine of agency of necessity to the case of an agent who, whilst in Russian Georgia, found himself, through violent events, unable to deal with goods in accordance with his instructions and equally unable to communicate with his principals. A like ruling has been given, on substantially similar facts, in other cases (unreported) in the King's Bench Division. Upon the first point I rule in the defendants' favour.

I must refer briefly to several other features of the doctrine of agency of necessity in a case where, as here, the agent has, without orders, sold the goods of his principal. In the first place, it is, of course, clear that agency of necessity does not arise if the agent can communicate with his principal. This is established by all the decisions: see Carver on Carriage by Sea, 6th ed., arts. 295, 299; Scrutton on Charterparties, 11th ed., art. 98; and *Springer* v. *Great Western Ry.* (2) The basis of this requirement is, I take it, that if the principal's decision can be obtained the agent should seek it ere acting. In the present case it is admitted that the agents could not communicate with the principal. In the next place it is essential for the agent to prove that the sale was necessary. What does this mean? In *Cannan* v. *Meaburn* (3) Park J. said: "The master cannot sell except in a case of

(1) (1922) Unreported. See 10 Lloyd's List Rep. 678.

(2) [1921] 1 K. B. 257.

(3) (1823) 1 Bing. 243, 247.

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inevitable necessity." In *Australian Steam Navigation Co.* v. *Morse* (1), however, Sir Montague Smith said: "The word 'necessity,' when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power—what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take." Later on he refers to "commercial necessity." (2) In *Acatos* v. *Burns* (3) Brett L.J. uses the words "unless there is an urgent necessity for the sale." In *Atlantic Mutual Insurance Co.* v. *Huth* (4) Cotton L.J. says: "It lies on those who claim title to cargo, as purchasers from the captain, to prove that this necessity clearly existed; further . . . . it is not sufficient to prove that the master thought he was doing the best for all concerned, or even that the course adopted was, so far as can be ascertained, the best for all concerned." In *Sims & Co.* v. *Midland Ry. Co.* (5) Scrutton J., as he then was, said that the question was whether "necessity justified the sale." In *Springer's Case* (6), already quoted, Scrutton L.J. said that the defendants must show "that a sale was in the circumstances the only reasonable business course to take." With this may be compared art. 97 of Scrutton on Charterparties, 11th ed. In substance I may say that the agent must prove an actual and definite commercial necessity for the sale. In the third place, I think that an alleged agent of necessity must satisfy the Court that he was acting bona fide in the interests of the parties concerned. In *Ewbank* v. *Nutting* (7) Coltman J. said during the argument: "Does not the authority of the master extend to acts such as he, in the exercise of an honest judgment, thinks the best for the interest of the owner of both ship and goods?" See, too, pp. 808 and 810 of the same case. In *Tronson* v. *Dent* (8) the Privy Council plainly indicated that bona fides was essential in addition to

(1) (1872) L. R. 4 P. C. 222, 230.
(2) Ibid. 231.
(3) (1878) 3 Ex. D. 282, 290.
(4) (1880) 16 Ch. D. 474, 481.
(5) [1913] 1 K. B. 103, 112.
(6) [1921] 1 K. B. 257, 267.
(7) (1849) 7 C. B. 797, 804.
(8) (1853) 8 Moo. P. C. 419, 452.

actual necessity. See also the judgment of Lindley L.J. in *Phelps & Co.* v. *Hill* (1), Carver's Carriage by Sea, 6th ed., arts. 298, 299; and Scrutton on Charterparties, 11th ed., art. 97. Bona fides, in my opinion, is an essential condition for the exercise of the power of sale.

I have now stated the principles of law which, in my view, apply to this case.

I can now state quite briefly my conclusions of fact after carefully weighing the whole of the evidence, the correspondence and arguments. I hold in the first place that there was no necessity to sell the goods. They had been purchased by the plaintiff in time of war and not of peace. He bought them in order that he might be ready with a stock of goods when peace arrived. He had refused, by letters to the defendants, several profitable offers for some of them before the cessation of correspondence between the defendants and himself. The goods were not perishable like fruit or food. If furs are undressed they may deteriorate somewhat rapidly in the course of a year or two. But these furs were dressed, and not undressed. Dressed furs deteriorate very slowly. They lose somewhat in colour and suppleness year by year. The measure of deterioration depends on whether they are properly stored. If put into cold storage the deterioration is very little. Even if kept in an ordinary fur warehouse the deterioration is but slight, that is if care be used. The great bulk of the furs here were of the best quality. I see no adequate reason for the sale by the defendants, for I am satisfied that there was nothing to prevent the defendants from putting them into cold storage, and certainly nothing to prevent them from keeping them with proper care in their own warehouse. The expense of cold or other storage would have been but slight compared with the value of the furs. The plaintiff had given nearly 1900*l.* for them, and they steadily rose in value. The contra account of the defendants was less than 400*l.* The margin therefore was of the most ample description. The defendants could and ought to have stored the goods till communication with Roumania was restored.

(1) [1891] 1 Q. B. 605, 611–12.

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I have said that the value of the furs was rising. Broadly speaking, it may be said that from 1917 on to 1919 there was a steady and sometimes a rapid rise in the value of furs. This arose from the shortage of supply. The slight deterioration of the furs was far outweighed by the general and striking increase in market prices. I can see no point of time at which the defendants could honestly and fairly say : " In the interests of the plaintiff it is imperative that we sell his goods." That the furs were deteriorating but slightly is, I think, plain, and particularly when I observe the prices at which the defendants sold them. The defendants could not have formed the view at any given time that there was a necessity for sale, for they sold the goods by about seventeen different sales ranging from October, 1917, to September 20, 1918. If the defendants honestly believed in the necessity of sale they could at any time have sold the whole. In view of the military position in September, 1918, the sales in that month are significant. I hold that there was no commercial necessity for the sale.

In the second place I decide, without hesitation, that the defendants did not act bona fide. I need not repeat the observations I have already made as to the absence of necessity for the sale. But I must add a few further words. [His Lordship reviewed the evidence, and continued :] I hold that the defendants were not in fact agents of necessity, that the sales of the plaintiff's goods were not justified, and that the defendants acted dishonestly. In the result I give judgment for the plaintiff for 1822*l.* with costs.

Judgment for plaintiff.

Solicitor for plaintiff : *Arthur Rutherford.*

Solicitors for defendants : *Lawrance, Webster, Messer & Nicholls.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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Oct. 26, 29;
Nov. 16, 19.

BRANDT AND ANOTHER *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LIMITED.

[1921. B. 1102.]

Ship—Bill of Lading—"Apparent good order and condition"—Indorsement to Pledgee—Reconditioning Cargo—Delay—Right of Pledgee to sue—Exemption—Prolongation of Voyage—Deviation—Bills of Lading Act, 1855 (18 *&* 19 *Vict. c.* 111), *s.* 1.

A number of bags of zinc ashes were shipped on board a vessel at Buenos Aires for carriage to Liverpool. Some of the bags had been wetted by rain before shipment and the upper layers of bags in one of the holds became heated. The shipowners gave a bill of lading stating that the bags were shipped in apparent good order and condition.

The master of the vessel, fearing damage to the ship and other cargo, discharged most of the bags at Buenos Aires and placed them in a warehouse; and after unnecessary delay they were reconditioned and reshipped on another vessel and forwarded to their destination at an expenditure of 748*l.* The goods arrived at Liverpool three months after the arrival of the first vessel. In the meantime the value of zinc ashes had fallen.

The bill of lading was indorsed to pledgees, who on the faith thereof made an advance to the shipper. When the second vessel arrived the indorsees presented the bill of lading, and paid the freight and, under protest, the 748*l.*, for which the shipowners claimed a lien on the cargo.

In an action by the indorsees against the shipowners (1.) for damages for delay in forwarding the goods and (2.) for repayment of the 748*l.*:—

Held, (1.) that although the plaintiffs, not being indorsees of the bill of lading to whom the property in the goods passed within the meaning of s. 1 of the Bills of Lading Act, 1855, could not sue on the contract contained therein, yet from the acts of presentation of the bill of lading, payment of the freight, and delivery and acceptance of goods specified in the bill of lading, there might and ought to be inferred a contract between the parties to deliver and accept the goods according to the terms of the bill of lading.

Stindt v. *Roberts* (1848) 5 D. & L. 460 and *Allen* v. *Coltart & Co*, (1883) 11 Q. B. D. 782 approved.

(2.) that the defendants were estopped from denying that the goods were shipped in apparent good order and condition, and, as the wetting which caused the delay did not occur after shipment, that they were liable in damages for the delay unless they were excused by the conditions in the bill of lading.

Compañia Naviera Vascongada v. *Churchill* [1906] 1 K. B. 237 approved.

(3.) that the plaintiffs were entitled to recover the amount paid to the defendants under protest, inasmuch as they were precluded by the

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estoppel from showing the only cause there was for discharging, warehousing, and reconditioning the goods.

The bill of lading contained a clause exempting the defendants from liability for delay, loss, or damage caused by prolongation of the voyage;

Held, (4.) that the defendants could not rely on this clause as a defence, inasmuch as the delay was such as to substitute a different voyage for that contemplated by the bill of lading, and to amount to a deviation.

Judgment of Greer J. affirmed.

APPEAL from the judgment of Greer J. in an action tried before the learned judge without a jury.

The action was brought by Messrs. Arthur H. Brandt & Co., merchants carrying on business in London, for damages for breach of a contract contained in a bill of lading dated March 23, 1920, and for a return of 748*l.* 10*s.* paid under protest, and in the alternative by F. W. Vogel, trading as Vogel & Cia., of Buenos Aires, shippers of goods under the bill of lading, against the defendants, the owners of the steamship *Bernini*. The plaintiffs alleged that the defendants, having received from Vogel & Cia. on board the *Bernini* at Buenos Aires in March, 1920, 6005 bags of zinc ashes, wrongfully discharged 5620 of the bags at that port and only forwarded them after unreasonable delay in their steamship *Cavour* on July 15, 1920, and that the plaintiffs were compelled, in order to get delivery, to pay 748*l.* 10*s.*, the amount of alleged expenses for reconditioning the 5620 bags of goods at Buenos Aires after they had been discharged as aforesaid and before they were reshipped on the *Cavour*, the defendants having claimed a lien for that amount on these goods.

The defendants pleaded that they were justified in discharging the 5620 bags at Buenos Aires, because they had become wet by rain before they received them; that the goods became heated in the hold, and that it was necessary to discharge and recondition them in order to preserve them and protect other cargo in the same hold; that by the terms of the bill of lading the defendants were relieved from liability for damage caused by rain; that there had been no unreasonable delay in reconditioning and forwarding the 5620 bags of goods, and that they were therefore not liable for the

consequences of any delay in the carriage of these goods to Liverpool, the port of discharge. They also counterclaimed for 167*l.* 3*s.* 2*d.*, the difference between 915*l.* 13*s.* 2*d.*, the actual cost of reconditioning, and the 748*l.* 10*s.* which they had received in discharge of their lien.

The plaintiffs Brandt & Co. pleaded in reply that they were indorsees of the bill of lading and that the defendants were estopped from asserting as against them that the goods were or became dangerous through any defect which could have been observed on shipment, inasmuch as the bill of lading stated that the goods were shipped in apparent good order and condition.

The following facts were proved at the trial: The plaintiffs Brandt & Co. were and had been for many years the London correspondents of Vogel, selling his goods in return for a commission and financing the transactions by accepting bills of exchange for 90 per cent. of the invoice price of the goods on receipt of the bill of lading for the goods, the bill of lading or the proceeds of the sales being their security for advances they thus made.

Between March 9 and 13, 1920, Vogel delivered on board the steamship *Bernini* 5525 bags of zinc ashes, which were placed in No. 1 hold. On March 20 he delivered a further quantity of 190 bags, ninety-five of which were placed in No. 1 hold and ninety-five in No. 5 hold between decks. On March 22 290 bags more were loaded in No. 5 hold. There was rain at Buenos Aires on March 12 and 13, and heavy rain on March 17 or 18. When the goods left Vogel's warehouse they were dry, but a considerable part of 1605 bags delivered on March 12 and 13 were very wet and their condition could have been observed by any reasonably observant person receiving them on board the ship. None of the goods afterwards found to be damaged through wet became wet after they were delivered to the ship.

When zinc ash becomes wet oxidization takes place and heat is generated. The intensity of the heat and the time during which it is given off depend on the amount of moisture and the quantity of unoxidized zinc in the wet bag. In this

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case the heat might have reached such a degree as to damage the bags and, by allowing the zinc to escape, to damage the other cargo, cotton and cotton seed, in hold No. 1.

On March 21 and 23 some of the 5525 bags in No. 1 hold were observed to be developing heat. Lloyd's agents were called in to survey and advise. A Mr. Ford surveyed the bags and found considerable heating in the top layer and probably some heating in the second layer. He inferred that there would be greater heat in the lower layers, and gave his opinion that both the ship and the surrounding cargo in hold No. 1 were in danger, and advised that the zinc ashes should be discharged from that hold and reconditioned. So far as concerned the ship it was agreed that this was a mistaken view. There was no heating below the two top layers. But there was risk of damage to the other cargo in hold No. 1.

The shippers declined to assent to the discharge of the zinc ashes from this hold, and left to the shipowners the responsibility of deciding what should be done.

The defendants' agent, without taking any further steps to ascertain the extent of the heating, discharged all the bags which were in hold No. 1. In the opinion of the learned judge this was unnecessary; a reasonable examination of the bags as they were discharged would have shown that no more than two layers, about 1800 bags or one-third of the bags in the hold, need have been discharged; but it was necessary that this quantity should be discharged and reconditioned, and they ought to have been reshipped and sent forward as soon as possible. The *Bernini* left Buenos Aires on April 2 carrying only the 385 bags in her 'tween decks, No. 5, hold.

The 5620 bags in No. 1 hold were discharged partly into lighters and partly on the quay. They were not placed in any warehouse until the beginning of May. Then the reconditioning began. This was completed, the necessary permit for export was obtained, and the goods were shipped on the defendants' steamship *Cavour*, which weighed anchor on July 15. If reasonable efforts had been made to deal with

the 1800 which alone required to be dealt with, they could have been reconditioned and the necessary permit for export could have been obtained in time to load them on the defendants' steamship *Euclid*, which sailed on May 11; but in the opinion of Greer J. there was unreasonable delay in obtaining a warehouse, in dealing with the goods in the warehouse, and in applying for and obtaining the permit.

On March 23 the ship's agent had signed and delivered to Vogel the bill of lading of the goods in question in the following form: "Shipped in apparent good order and condition by F. W. Vogel & Cia. on the steamship *Bernini* whereof is master, &c., lying in and off the Port of Buenos Aires and bound for Liverpool (having liberty . . . . to ship or tranship the goods into any other steamer before the commencement or at any period of the voyage . . . .) six thousand and six (sic) bags of zinc ashes . . . . to be delivered from the ship's tackle, where the ship's responsibility shall cease, at the port of Liverpool unto order or to his or their assigns he or they paying freight for the said goods on delivery in cash without deduction at the rate of 150*s.* per ton of 2240 lbs. gross. . . . . 1. The ship shall not be liable for any delay, loss or damage caused by the act of God, perils of the seas, ports, rivers, or navigation of what nature or kind soever and howsoever caused . . . . land damage . . . . prolongation of the voyage, loss or damage arising directly or indirectly in store, on wharf, in craft, or on board, before, during, or after loading or until delivery is completed, rain, insufficiency of strength of packages, causes beyond shipowners' control . . . . effects of climate, sweating, heat of holds, evaporation, contact with goods, the ship, or anything in the ship . . . . latent or other defects, whether existing at the time of shipment or during the voyage . . . . whether or not all or any of the matters or things above-mentioned arise or be caused by the act, negligence or default or errors in judgment of agents, pilots, masters, engineers, stevedores, surveyors . . . . mariners or others whether on board the vessel carrying the goods, or any craft employed, or any other person or persons whose acts owners might otherwise be responsible or liable for, nor

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by unseaworthiness or unfitness of hull machinery or equipment, whether when loading sailing or arising during the voyage.

"2. . . . . The ship will not be responsible for anything that may occur after the cargo or any part thereof has come within the control of any public authorities, dock, railway, warehouse or other carrier, or reached a custom house, nor for any consequences arising from sanitary or other regulations of authorities which may prevent or delay the discharge or removal of cargo. . . . . "

Vogel then drew a draft at sight on the plaintiffs Brandt & Co. for 90 per cent. of the invoice price of the 6005 bags, indorsed the bill of lading and sold the draft with the bill of lading attached thereto to the National City Bank of New York at Buenos Aires. On May 3 the draft with the bill of lading attached was presented to the plaintiffs Brandt & Co. for payment. By this time the plaintiffs had received information that 5525 bags had been discharged at Buenos Aires on the advice of Lloyd's surveyor on the ground that they had become heated, but they did not know the cause of the heating, or that the bags were wet when delivered to the ship, or whether they had been reshipped on the *Bernini* or were coming forward on a later steamer. In these circumstances, finding it stated in the bill of lading that the goods had been shipped in apparent good order and condition, and induced thereto by that statement, the plaintiffs directed their bankers to pay the draft and this was done.

The plaintiffs Brandt & Co. had sold the whole consignment of 6005 bags to a firm to whom they had handed the bill of lading, but on the arrival of the *Bernini* on May 3, 1920, these purchasers repudiated the contract, either because, as found by the learned judge, they had stipulated for a February shipment whereas the shipment on the *Bernini* was in March, or because the vessel only had 385 bags on board instead of 6005. They accordingly returned the bill of lading to the plaintiffs Brandt & Co., who took delivery of the 385 bags and paid the freight for the same. In a subsequent arbitration between the plaintiffs and their purchasers an award was

made that the purchasers should accept these goods. When the rest of the goods came forward on the *Cavour* the plaintiffs Brandt & Co. took delivery of and paid freight on them also; and in order to obtain possession of the last-mentioned goods, they paid under protest the sum of 748*l.* 10*s.* claimed by the defendants as the cost of discharging, reconditioning, and reshipping them. The plaintiffs claimed to recover this sum.

Between May 3, when the *Bernini* arrived, and August 11, when the *Cavour* arrived, the value of the cargo had diminished. The plaintiffs claimed the difference in value as damages for breach of the defendants' contract to carry the 5620 bags on the *Bernini* according to the terms of the bill of lading.

Greer J. gave judgment for the plaintiffs Brandt & Co. for 748*l.* 10*s.*, and for a sum to be assessed by an Official Referee as damages for breach of the contract contained in the bill of lading.

In the course of his judgment the learned judge said: The first questions to be decided are whether Messrs. Brandt & Co. are entitled to sue upon the contract evidenced by the bill of lading, and whether the defendants are estopped from setting up that the damage was due to the excepted cause of rain. The plaintiffs contended that they were indorsees of the bill of lading to whom the property in the goods passed by reason of the indorsement within the meaning of s. 1 of the Bills of Lading Act, 1855. It was decided in *Sewell* v. *Burdick* (1) that bankers to whom a bill of lading had been indorsed as pledgees to secure advances were not indorsees to whom the property passed within the meaning of that section and were not liable for the freight under the bill of lading. The bankers in that case had not taken or demanded delivery of the goods by virtue of their security. The case therefore does not decide whether the benefit and burden of the contract contained in the bill of lading pass to pledgees who present the bill of lading and take delivery thereunder, but in the course of his judgment Lord Selborne says (2): "It may be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee

(1) (1884) 10 App. Cas. 74. (2) 10 App. Cas. 86.

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of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, quoad the shipowner. But it would be the reverse of reasonable to impose upon him such a burden, when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it." These observations seem to indicate that in the opinion of Lord Selborne if a pledgee in fact took delivery he would be in the same position as regards the contract contained in the bill of lading as a purchaser of the bill of lading. It seems however difficult to say that the property of a pledgee in a bill of lading and the goods it represents, which is a special property before he takes delivery and which is not included in the term "the property in the goods" in s. 1 of the Bills of Lading Act, 1855, becomes a general property if the pledgee presents the bill and takes possession, and that therefore as soon as he has taken possession he becomes an indorsee to whom the property in the goods has passed, within the meaning of s. 1. It was held by Cave J. in *Allen* v. *Coltart & Co.* (1) that in such a case the property did not pass within the meaning of the Act to such a pledgee. It was however held in that case that apart from the Bills of Lading Act, 1855, a pledgee taking delivery of the goods under the bill of lading enters into a contract to comply with all the conditions imposed by the bill of lading on the receiver of the cargo. There can be no doubt that in this case Brandt & Co. by presenting the bill of lading and receiving delivery impliedly promised to pay the freight and make any other payments which were payable by the receiver in respect of the goods. What was the consideration for this promise? Was it merely the delivery of the goods which were on the *Bernini*, or was it a promise by the shipowner to perform towards Messrs. Brandt all the obligations of the bill of lading? It is not necessary to go so far as to say that the implied consideration was a promise to perform all the obligations of the bill of lading. It is sufficient to say that it was a promise to deliver the goods to Messrs. Brandt in the

(1) 11 Q. B. D. 782.

condition in which they ought to be delivered under the bill of lading.

In my judgment Brandt & Co. are in a position to sue for damages for breach of the contract so made, even though they may not be within the provisions of the Bills of Lading Act. I think also they can rely on the estoppel arising out of the words " shipped in apparent good order and condition." There can be no doubt that a purchaser of goods to whom the bill of lading has been indorsed can rely on such an estoppel, even though it would not have been available for the shipper: *Compañia Naviera Vasconzada* v. *Churchill* (1); *Martineaus, Ld.* v. *Royal Mail Steam Packet Co.* (2) In my judgment, for this purpose Messrs. Brandt & Co. are in the same position as a purchaser to whom the property has passed. The defendants were under a contract with the plaintiffs to deliver the goods ex the steamship *Bernini* in the same condition in which they were shipped unless they could establish that they were excused from delivering the goods in that condition by one or another of the excepted causes. The well-known course of business in the sale and shipment of goods from foreign parts to this country makes it clear that the statement in a bill of lading that the goods are shipped in good order and condition is addressed to all those persons who in the ordinary course of business acquire an interest in the goods entitling them to obtain delivery under the bill of lading if they choose to do so. Those persons include bankers advancing money on the goods, and agents such as Brandt & Co. financing the transaction by accepting bills of exchange and taking delivery of the goods as security. I think also that Brandt & Co. materially altered their position to their detriment by acting on the assumption that they had a clean bill of lading. They made an advance to Vogel which they would not have made if the bill of lading had not stated that the goods had been shipped in apparent good order and condition. They were only under obligation to make advances upon the terms of having bills of lading which they could indorse to purchasers if it should be necessary to sell the goods for their own

(1) [1906] 1 K. B. 237. (2) (1912) 17 Com. Cas. 176.

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protection, and so invest the purchasers with all the rights attaching to the bills of lading. The defendants are therefore estopped as against Brandt & Co. from proving that any of the bags of zinc ash were apparently wet when delivered to the ship. The evidence proves that they were not wetted by rain after receipt by the ship. The defendants are accordingly precluded by a rule of law from showing that this damage was due to excepted causes. It follows that the liability of the defendants to Brandt & Co. must be determined on the assumption that the damaged bags required to be discharged and reconditioned by reason of causes for which the ship is responsible. If the damage had been due to causes for which the shipowners were not responsible they would have been justified in discharging and reconditioning the goods at the expense of the plaintiffs: *Notara* v. *Henderson*. (1) But this cannot avail the shipowners when it must be assumed that the damage was due to causes from the consequences of which they are not by their contract excused. No doubt the result is that Brandt & Co. can recover damages which their co-plaintiff, the shipper, could not have recovered, inasmuch as he through his agents knew that the bags were wet when delivered to the ship. The fact that Brandt & Co. had a complete remedy against their own principals, if they chose to pursue it, does not prevent them from suing the defendants: *Compañia Naviera Vasconzada* v. *Churchill*. (2) But the fact that the shipowners' agents, through failure to exercise reasonable care, discharged more bags than was necessary, and occupied more time than was necessary in reconditioning the bags that required reconditioning, and in reshipping, mitigates any appearance of injustice to the shipowners.

My judgment on the claim must be for Brandt & Co. for the return of the 748*l*. 10*s*. paid by them under protest, and damages for failure to carry the goods on the *Bernini* and deliver them in due course on the arrival of that vessel at Liverpool, the damages to be assessed by a referee to be agreed between the parties or, in default of agreement within

(1) (1872) L. R. 7 Q. B. 225. (2) [1906] 1 K. B. 237.

fourteen days, by an Official Referee; and for the same plaintiffs on the counterclaim. The alternative claim by Vogel is dismissed without costs.

The defendants appealed.

Raeburn K.C., *Singleton K.C.* and *Alan MacIver* for the appellants. The respondents, Brandt & Co., were not indorsees of the bill of lading to whom the property in the goods passed, within the meaning of s. 1 of the Bills of Lading Act, 1855. They merely held the bill of lading as security for the advance they had made to Vogel of nine-tenths of the invoice price of the goods: *Sewell* v. *Burdick*. (1) It is true that Lord Selborne L.C. in that case (2) suggested that if an indorsee, to whom the property has not passed, has the benefit of the bill of lading he must take it with the corresponding burden quoad the shipowner; but his rights and liabilities are determined not by the fact of presenting the bill of lading, but on the character in which he presents it, and that has been determined before he presents it. If he is a mere pledgee of the bill of lading, like the bankers in *Sewell* v. *Burdick* (1), or the appellants in this case, then his position must be considered apart from the Bills of Lading Act, 1855, and by reference to the law before that Act was passed. As the law then stood indorsement of a bill of lading to a purchaser of the goods passed the property in the goods, but it did not assign the contract of carriage, and if an indorsee of the bill of lading was aggrieved by a breach of that contract he had to sue in the name of the shipper with whom the contract was made, for at common law neither the benefit nor the burden of a contract was assignable. The result is that the respondents could not sue on the contract of carriage contained in this bill of lading.

But the learned judge has found that from presentation of the bill of lading and acceptance of the goods under it a new contract may be inferred by which the respondents undertook to deliver the goods upon the terms of the bill of lading. He reached this conclusion by way of an extension of the

(1) 10 App. Cas. 74. (2) 10 App. Cas. 86.

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principle of *Allen* v. *Coltart & Co.* (1) Now it is true that a shipowner has a lien on the goods for his freight, and that he may by the contract of affreightment have a lien for demurrage: *Stindt* v. *Roberts* (2); *Wegener* v. *Smith* (3); and he also has a lien for expenses incurred by him in reconditioning the cargo where this was reasonably necessary, for it is part of his duty to do this: *Notara* v. *Henderson.* (4) By presenting a bill of lading the indorsee in effect says to the shipowner or to his master: "If you will release your lien I will pay your freight or demurrage or expenses of reconditioning or whatever the charges may be": *Young* v. *Moeller* (5), per Parke B.; and a contract to pay the charges in return for the goods, that is to say the goods which he has on board, may be inferred as a matter of fact from these circumstances. This was all that was decided by *Allen* v. *Coltart & Co.* (1) The inference is an inference of fact; it is not a matter of law: *Sanders* v. *Vanzeller* (6); and being an inference of fact there must be some evidence to support it. From what fact in the present case could a jury properly infer a promise by the respondents to do more than release their lien and deliver the goods they had on board in return for the freight and expenses of reconditioning? The question is, what is the indorsee of the bill of lading prepared to do in order to induce the shipowner to release his lien; it is not a question of what the shipowner is to do in order to get the freight or demurrage. In short the judgment of the learned judge is based on a misapplication of *Allen* v. *Coltart & Co.* (1) The appellants therefore are not estopped from showing that the goods were wet by rain when taken on board, and that they are consequently relieved from liability by cl. 1 of the bill of lading.

Secondly, the appellants were entitled to the expenses of reconditioning the cargo. The learned judge has held that reasonable care on the part of the appellants or their agents would have shown that it was unnecessary to discharge all

(1) 11 Q. B. D. 782.
(2) 5 D. & L. 460.
(3) (1854) 15 C. B. 285.
(4) L. R. 7 Q. B. 225.
(5) (1855) 5 E. & B. 755.
(6) (1843) 4 Q. B. 260.

the bags in No. 1 hold at Buenos Aires, and that therefore the appellants had no right to be paid and consequently cannot retain all these expenses. This is to put too great a burden upon the captain of the *Bernini*, who was bound to act on the recommendation of Lloyd's surveyor. A captain can only be called upon to exercise a discretion. His acts are not to be censured merely because of an unfortunate result: *The Savona*. (1)

Assuming, as the learned judge has held, that the contract to be inferred from presenting the bill of lading and paying the freight imposes on the shipowner a duty to deliver the goods upon the terms of the bill of lading, the appellants are then protected from liability, because the loss, if any, from delay was due to a "prolongation of the voyage" within the meaning of cl. 1 of the bill of lading.

R. A. Wright K.C. and *James Dickinson* for the respondents. The evidence shows that the bags were not wetted after shipment. If the appellants are estopped from alleging that the bags were wetted before shipment they can show no cause for discharging the 5620 bags at Buenos Aires, or for warehousing or reconditioning or reshipping them. Consequently they cannot justify exacting 748*l*., the expense of doing these things. For similar reasons they have no answer to a claim for damages for delay in delivery; for this was due to what must be taken to have been an unnecessary discharging and reconditioning of the bags. Moreover the learned judge has found that, assuming the reconditioning was necessary, the appellants were unreasonably dilatory in warehousing, reconditioning, and dispatching the goods.

The case therefore depends upon whether the appellants are or are not estopped from denying that the goods were shipped in apparent good order and condition. Accepting the finding of the learned judge that the respondents were not indorsees of the bill of lading to whom the property in the goods passed, within the meaning of s. 1 of the Bills of Lading Act, 1855, but that they were merely pledgees having a special as distinguished from the general property in the

(1) [1900] P. 252.

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goods, so that they could not sue on the contract contained in the bill of lading; yet the learned judge was right in inferring on the authority of *Allen* v. *Coltart & Co.* (1) a contract by the appellants to deliver the goods, and by the respondents to accept the goods, upon the terms of the bill of lading, including the statement that the goods were shipped in apparent good order and condition. That statement, if acted upon, as it was, by the respondents to their detriment, estops the appellants: *Compañia Naviera Vasconzada* v. *Churchill.* (2)

[They were stopped.]

Raeburn K.C. in reply.

BANKES L.J. This is an appeal from a judgment of Greer J. in an action raising an interesting and important question with which the learned judge dealt in a very clear and exhaustive manner and in my opinion quite correctly. Indeed it is only in deference to the arguments which have been addressed to us that I do not content myself by saying that I agree with the judgment delivered by the learned judge.

The action was brought by Brandt & Co., and alternatively by F. W. Vogel trading as Vogel & Cia. at Buenos Aires. The claim was for delay in the delivery of some 5620 bags of zinc ashes and for the return of 748*l.*, the amount they had to pay the appellants, the shipowners, for reconditioning these goods.

The main question raised in the Court below was whether Brandt & Co. had a cause of action arising from the fact that they were the holders of the bill of lading and had presented it. They claimed to have a right of action on one or both of two grounds. One was that the general property in the goods had passed to them, and the other was that from the fact of their presenting the bill of lading, paying the freight and taking delivery of the goods there was to be inferred a contract by the defendants to make delivery upon the terms of the bill of lading so far as they were applicable to the circumstances at the time when the plaintiffs took delivery. Greer J. decided against Brandt & Co.'s contention founded upon the

(1) 11 Q. B. D. 782. (2) [1906] 1 K. B. 237.

general property in the goods having passed to them, and I agree with that view, and it is unnecessary to express any opinion about it, or to go into the facts in relation to it.

The argument in this Court has been mainly directed to the question whether there was a contract between Brandt & Co. and the shipowners which entitled Brandt & Co. to sue for damages for the delay in delivery of these goods and for the return of the money they had had to pay for reconditioning them. Now, it is quite true that there is no authority expressly covering the question how far, that is to what extent, the shipowner is bound by the contract which may be inferred from the offer made by the holder of a bill of lading to take delivery of the goods, which offer is accepted by the shipowner. Is his obligation merely to deliver the goods which he has on board, or is he bound to the extent of the contract contained in the bill of lading so far as its terms are applicable to the circumstances of the case. We have been referred to three authorities: *Stindt* v. *Roberts* (1); *Young* v. *Moeller* (2); and *Allen* v. *Coltart & Co.* (3) By those authorities it has been clearly established that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the shipowner, the holder of the bill of lading comes under an obligation to pay the freight and to pay the demurrage, if any, and there are general expressions in all those three cases, I think, in which the learned judges have said that the contract so made by that offer and acceptance covers, so as to include, the terms of the bill of lading. In my opinion in this particular case the contract must include the terms and conditions of the bills of lading and for this reason. In this case the bill of lading holder offered the freight before the goods were delivered; and in fact paid it, and under those circumstances it seems to me that by the acceptance of the freight and the subsequent delivery the shipowners undertook an obligation to deliver the goods as described in the bill of lading. I think from the shipowner's point of view it must necessarily include

(1) 5 D. & L. 460. (2) 5 E. & B. 755.
(3) 11 Q. B. D. 782.

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the whole of the terms of the bill of lading, because he must desire that he should be covered by the exceptions in the bill of lading. I think, therefore, that the learned judge is right when he states his conclusion that on the facts in this case it is sufficient to say there was a promise by the shipowners to deliver the goods to Brandt & Co. in the condition in which they ought to be delivered under the bill of lading. So much for the scope and extent of the contract. I entirely agree with the learned judge's conclusion upon this very important matter.

Now these goods, or some of them, were damaged by rain while they were waiting for shipment; and while the goods were waiting in this condition the appellants issued a bill of lading in which they admitted that the goods were received in apparent good order and condition. The learned judge has found that Brandt & Co. materially altered their position to their detriment by acting on the faith of this clean bill of lading. I agree with that finding of the learned judge. In these circumstances Brandt & Co. contend that the appellants are estopped from alleging that the damage to these goods was caused at the only time when it was caused—namely, before the goods were put on board.

The delay in delivering the goods, which was the first subject matter of the claim, arose in this way: The ashes were shipped on board the *Bernini*. After they had been placed on board it was ascertained that a number of the bags had heated, and apprehension was felt lest they should prove dangerous, not only to the other goods on board, but possibly to the vessel. Lloyd's agent was called in, and he examined the goods and reported that he found the top layers of bags very seriously heated; and in his report he stated that from the condition of those bags it was apparent to him that the bags below must be heated probably to a much more dangerous extent than those he was able to examine. As the result of that examination and report the bags were taken out of the vessel and after a time they were reconditioned, or some of them were, and those bags were not reshipped until the lapse of a very considerable time. There were a small number of

bags, 385 bags, which were a separate lot put into a different hold and they were undamaged, and were taken by the *Bernini* upon the contemplated voyage from Buenos Aires to Liverpool. On arrival at Liverpool the plaintiffs, Brandt & Co., who had resold the goods, on presentation of the documents to them paid the draft and took delivery of the 385 bags. The remainder of the bags which had been taken off the vessel at Buenos Aires and reconditioned were not sent forward until July, and did not arrive in this country till August, when Brandt & Co. took delivery of them. Mr. Raeburn complained of the learned judge's judgment upon this part of the case in one or two particulars. He said that the shipowners ought not to be held responsible for the delay that occurred whilst these goods were being reconditioned or before they were reconditioned, because it was putting too high a duty upon the captain to hold that he was negligent in taking these goods out of the ship under the circumstances in which he was placed. Now it is quite true that he was in a difficult position, because he had had the report from Lloyd's agent, who intimated that the lower tiers of bags were in his opinion in a much more dangerous condition than those which he was able to inspect; but the fact is that the lower tiers of bags were apparently in a perfectly satisfactory condition, undamaged and dry, and any examination of the bags during the time that they were being unloaded, or after they had been placed on shore, would have disclosed the fact that the surveyor was mistaken in the conclusion at which he arrived. In these circumstances it seems to me that the learned judge was quite justified upon those facts in finding that the delay was the fault of the shipowners, and that Brandt & Co., being entitled in his view to sue upon the contract, had proved that they had suffered damage by reason of the breach of contract. So far therefore Brandt & Co. have a right of action arising out of the contract for damages due to the delay in delivering the goods.

The other point in the case was in reference to the claim to recover the 748*l.* which Brandt & Co. had to pay in order to get possession of the goods, the amount which the

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shipowners paid for reconditioning the goods. I think there is something to be said, at any rate as against Messrs. Vogel, why the shipowners should not repay the whole of this amount, and that at any rate the cost of reconditioning the portion that was damaged ought to be allowed; but that matter was not specifically raised on the pleadings, and Mr. Raeburn admits that it ought not to affect the costs. In these circumstances we ought not to allow an amendment in order to raise that comparatively small point in this very important case. The sum claimed must therefore be treated as a whole, and as the appellants can show no cause for reconditioning the goods, Brandt & Co. are entitled to be repaid this sum.

There remains the question whether cl. 1 of the bill of lading protects the shipowners from liability for the delay. That clause is a very long and rather confused clause, and it is not easy at first sight to see the construction which one ought to place upon it, but after the discussion which has taken place I am satisfied that the only condition upon which the ship is entitled to rely is the condition which provides for non-liability in the event of a prolongation of the voyage owing to any of the matters which are set out in the clause. Can it be said that the taking of the whole of these goods out of the *Bernini* before she started at all and retaining them on shore for more than three months until they were reconditioned, was on any reasonable construction of the expression a "prolongation of the voyage" within the meaning of this clause? I do not think it can reasonably be said that there was here any prolongation of this voyage at all. What happened was that the voyage referred to in the bill of lading did not commence.

Under these circumstances, in my opinion the view taken by the learned judge was on all points correct, and I think his judgment must be affirmed, and the appeal dismissed with costs.

SCRUTTON L.J. I substantially agree with the judgment of Greer J., and I only give in my own words some reasons

for agreeing, because some of the matters involved are of considerable commercial importance. The dispute arises in this way. F. W. Vogel in South America was about to ship a parcel of zinc ashes in bags. Through carelessness he shipped them wet. Zinc ash is a material in which if wetted a certain amount of heat is produced. While Vogel was careless in shipping these goods wet, the shipowners were careless in giving a bill of lading stating that they were shipped "in apparent good order and condition" when they were not, because they were externally wet, which could be seen. The result was that the shipowners put into circulation a document which they knew might be passed on to other persons for value, and on the statements in which other persons might act, which contained the untrue and material statement that the goods had been shipped "in apparent good order and condition." The result, according to a well-known decision, which has been repeatedly followed since, was that persons taking a bill with that statement in it could in any complaint against the shipowner who had issued it rely on that statement and prevent the ship from proving the true fact which had not been correctly stated in the bill. That was the decision in the *Compañia Naviera Vascongada* v. *Churchill & Sim* (1), and one of the many cases in which that has been followed is *Martineaus, Ld.* v. *Royal Mail Steam Packet Co.* (2) After this bill of lading had been given the zinc ashes, being on board the ship in the port in South America, heated. They were stowed in a hold with cotton. The captain called in Lloyd's agent, and Lloyd's agent took the correct view that the heat might damage the cotton and the incorrect view that it might damage the ship, and recommended the whole of the zinc ashes to be discharged. The learned judge finds that only the top third of the zinc ashes were heated and wet, and that the remaining two-thirds might safely have been allowed to remain in the ship. Anyhow, the whole of the ashes were taken out, and some one was very careless in not inspecting the goods while they were being discharged. If this had been done it would have been

(1) [1906] 1 K. B. 237. (2) 17 Com. Cas. 176.

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found out that the bottom two-thirds were not heated and might just as well have stayed in the ship. But this large parcel was taken out of the ship, and a warehouse was found for it. It was spread out, and it was some three months or more before it was reshipped for the United Kingdom. There had of course been a considerable sum spent on reconditioning it. Some 385 bags had gone forward on the original ship, the *Bernini*, and the balance did not come on till some three months later. Brandt & Co. were the consignees of the goods in England who advanced nine-tenths of their value, and when the bill was presented to them they had heard that some difficulty had occurred after shipment. They looked critically at the bill of lading to see what it stated about the condition of the goods, and found that the goods were stated to be "in apparent good order and condition," and on the faith of that untrue statement they presented the bill of lading and received the goods. To get the goods they had to pay the 748*l.* odd expenses of reconditioning. They then claimed upon the shipowners first of all for damages for delay in that the goods ought to have got to England, say in May, and did not get there until August, by which time the market had fallen; secondly they claimed to recover back the sum that they had paid under protest, the 748*l.* odd for reconditioning the goods.

The first line of defence made was that Messrs. Brandt were not in any way parties to the bill of lading so as to be able to rely on the estoppel contained in it. This raises a novel point which has not in terms been considered in the authorities, as far as I know. Before the Bills of Lading Act, 1855, was passed, by the custom of merchants the indorsement of the bill of lading passed the property in the goods contained therein, but it did not assign the contract contained therein, and therefore the person who by indorsement became the owner of the goods did not by the same indorsement acquire a right to sue the shipowner upon his contract, which was evidenced in the bill of lading; and before 1855 a long series of decisions had been given, of which perhaps two of the leading cases

are *Sanders* v. *Vanzeller* (1) and *Cock* v. *Taylor* (2), the general effect of which was that, while it could not as a matter of law be said that by presenting a bill of lading the person who presented it became liable to the terms of the bill of lading, there might as a matter of fact be inferred a contract from presenting the bill of lading and taking the goods. In every case that has been reported the question which was discussed seems to have been, Was the person who presented the bill of lading and took the goods bound to comply with the conditions which had to be performed by the owner of the goods; was he bound to pay freight, or demurrage, or any other specific charge mentioned in the bill of lading? The question of his rights against the shipowner, as far as I know, was never expressly raised, and I think there is a reason why it should not be so. If he had any property in the goods he could sue the shipowner in tort, and it was to the interest of the shipowner to say that the person who took the goods was bound by the whole bill of lading, including those terms which had to be performed by the shipowner and those exemptions from liability which were contained for the benefit of the shipowner. But when one comes to consider the contract to be inferred from the fact of taking delivery and the promise by the person who takes delivery to perform the terms of the bill of lading, and one asks what was the consideration moving from the shipowner for that promise, one sees it was to deliver the goods on the terms of the bill of lading. That document contains the terms on both sides which were implied from presenting the bill of lading and taking delivery under it. When the Bills of Lading Act, 1855, was passed this difficulty was so far remedied that when the whole property passed by the indorsement to the indorsee, the contract also passed. That left untouched the question where the whole of the property did not pass to the indorsee, but only some property which would enable him to sue in tort for damage to his goods or conversion or detinue of his goods. In *Sewell* v. *Burdick* (3) the question was raised:

(1) 4 Q. B. 260. (2) (1811) 13 East, 399.
(3) 10 App. Cas. 74.

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What is the position of bankers who have taken a bill of lading as a pledge, as security for an advance, and who never present the bill of lading because their advance is small, and the presenting of the bill of lading would render them liable for a much larger amount, and the House of Lords has decided that bankers who are pledgees not having the whole property and not presenting the bill of lading, and not taking delivery under it, are not liable to perform the conditions of the contract in the bill of lading? Lord Selborne expressed the view that if the bankers did present the bill of lading they might then be liable on the contract contained in the bill of lading. It seems to me that such a case is to be governed by the old law which existed before the passing of the Bill of Lading Act. When a holder of a bill of lading, who has some property in the goods, presents the bill of lading and accepts the goods, can there be inferred a contract on each side to perform the terms of the bill of lading? The view that Greer J. has taken is that such a contract can and ought to be implied in this case, and I take the same view. It follows, therefore, that Brandt & Co. may enforce the terms of the bill of lading and are entitled to the benefit of the estoppel which is contained in the statement, "In apparent good order and condition."

Then comes the question, what is the effect of that estoppel on the claims in this case? Brandt & Co. claim, first of all, damages for delay, that is to say, damages in that the goods should have arrived at a particular date and did not arrive till much later, by which time the market had fallen. The shipowners might be able to plead that they were protected by an exception, but in this case they are in the difficulty that they cannot prove what has caused the delay; they cannot prove that it was caused by damage to the goods before shipment, because they have stated that they were shipped "in apparent good order and condition" and are estopped from disproving it. They have proved that it was not the result of any fresh cause acting on the goods after they were shipped, and, therefore, they are in the unfortunate position that they cannot prove that any matter

which caused the delay comes within any of the exceptions which protect them. They might be able to say—and this is the matter which has given me most difficulty in the case—that there is a clause in the bill of lading that the ship shall not be liable for any delay, loss or damage caused by prolongation of the voyage, whether or not it arises from negligence, or errors in judgment of agents, masters or surveyors. I myself am inclined to think that prolongation of the voyage might apply to facts like this. The bill of lading is one to ship by the *Bernini* and to ship or tranship the goods into any other ship before the commencement of any period of the voyage, and I think that prolongation of the voyage might very well relate to the voyage by the *Bernini* or by a ship into which the goods were transhipped, and it might be said that the prolongation by transhipment, or the taking of the goods out of the *Bernini*, was due to the negligence of the agent, master or surveyor, or error of judgment. But the shipowners are in this difficulty in this case, that not only was there a taking out of the ship through negligence and error of judgment, but after the goods were taken out there was an unreasonable delay in putting them back again, and it appears to me that the result of those two unreasonable acts is that there is sufficient delay to amount to a deviation; and if once a deviation takes place the shipowner cannot rely on any of the exceptions. From that point of view, therefore, I find it unnecessary to decide positively whether prolongation of the voyage does or does not cover this taking out of one ship and transhipping into another with unreasonable delay. The result is that the shipowners who have brought the goods at a later date than they ought to have done, are unable owing to the estoppel to prove the true facts; they cannot show any cause of delay which brings them within the exceptions, and consequently they are liable for the damages for delay. The same reasoning shows that Messrs. Brandt can recover back the sum which they paid under protest for reconditioning the goods, because the shipowners are unable to prove that they are protected in the circumstances which gave rise to the reconditioning of the goods

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by any of the exceptions. They cannot prove that the necessity for reconditioning arose from the condition in which the goods were brought to the ship by the shipper, because the estoppel prevents them. They have proved that the circumstances which required the taking of the goods out of the ship did not result from anything which happened to them after they got into the ship, and, consequently, they are unable to prove any circumstances which give rise to the necessity for expenditure in reconditioning and for which they are protected. Those two matters cover the whole claim put forward in this case, and in my view, for the reasons which I have endeavoured to state shortly, substantially the same as those of Greer J., I think he came to the right conclusion and therefore that this appeal must be dismissed.

ATKIN L.J. I agree. I assume for this purpose that Brandt & Co. are not in a position to sue the shipowners under the Bills of Lading Act; that is to say, they cannot prove that the property in the goods passed to them by indorsement of the bill of lading. The question then is whether any and what contract arises between them and the shipowners in the circumstances in which they did in fact take delivery. I am inclined to agree with the criticism addressed by Greer J. to the dictum of Lord Selborne in *Sewell* v. *Burdick* (1), and for my part I have great difficulty in seeing how a pledgee of the goods who under the decision in *Sewell* v. *Burdick* (1) does not under the Bill of Lading Act get the right to sue on the contract in the bill of lading, can improve his position by doing that which it was necessary he should do as pledgee of the bill of lading—namely, taking delivery of the goods when the ship arrives. That seems to me to be merely asserting his limited right of possession in order to continue to act as pledgee. But his position may for all that be very much strengthened by the circumstances under which he takes delivery. Before the Bills of Lading Act a series of cases

(1) 10 App. Cas. 74.

had been decided gradually extending the liability of the indorsee of a bill of lading who came to the shipowner and claimed delivery under it. The first class of decisions I think arose by reason of the terms of the bill of lading which made the goods deliverable to order, or his assigns, he or they paying freight. It was said that if a person came to the shipowner and said to him, "Deliver the goods to me as an assign," the shipowner was entitled to insist that as a condition of receiving the goods the assign should in the terms of the bill of lading pay the freight; and therefore he was held bound to pay the freight in an action of assumpsit on the delivery of the goods. Later on that obligation was extended to paying charges other than freight in cases where those other charges were not specified in the contract expressly as being payable by an assignee, as, for instance, to payment of demurrage or other charges, and there the contract obviously becomes a contract to be implied from the circumstances of the delivery being taken by the assignee of the bill of lading. Then is there any corresponding obligation on the part of the shipowner in that contract? It appears to me that just as plainly as the assignee is bound by an implied contract, so is the shipowner, and the shipowner's obligation in the case where freight has in fact been paid by the holder of the bill of lading, is that he will deliver the goods. What other contract could be inferred from the fact that an assignee of a bill of lading goes to the shipowner's representative and offers him the freight, which is accepted by the shipowner? The necessary implication when the shipowner says, "Yes, I will take the bill of lading freight," is that he undertakes in consideration of that to deliver the goods which he has received on board under the bill of lading. Is it a contract to deliver the goods on the terms of the bill of lading? Shipowners would be surprised to hear it suggested that having undertaken to carry goods upon terms in their bill of lading qualifying and limiting their liability they are nevertheless under an absolute obligation to deliver the goods and not an obligation qualified by the exceptions in the bill of lading. They are not accustomed to having a burden put upon them in reference

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to the carriage of goods except accompanied by the qualification of exceptions, and no other contract could properly be inferred. The bill of lading freight has been assessed and calculated upon the footing of a contract of carriage, qualified by exceptions from liability, and it would be very unfair to say to a shipowner: "You have received the bill of lading freight which is based upon an obligation to carry qualified by all the exceptions, and now having taken it you must accept an obligation to deliver the goods unqualified by any of the exceptions." I have no doubt at all that the obligation on the shipowner is to deliver on the terms of the bill of lading. It follows that the contract to be inferred in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the bill of lading, so far as they are applicable to discharge at the port of discharge. In these circumstances it appears to me that the indorsee of the bill of lading is substantially in the same position as though he came under the Bills of Lading Act, and I see no reason why he should not have the benefit of the estoppel created by the shipowners' representation in the bill of lading that the goods had been received "in apparent good order and condition." That is a representation which, as the learned judge says, the shipowner must contemplate will be made and repeated to and acted upon by every successive holder of the bill of lading, and each indorsee who takes delivery under the bill of lading. The indorsees in this case have acted upon it, in the first place by taking the bill of lading and accepting the draft, and, in the second place, by paying the freight and getting the promise of the shipowners to deliver the goods. I think that all the conditions for creating an estoppel exist. The result is, therefore, that the normal conditions applicable to such an estoppel apply, and the shipowners are precluded from saying that the goods were not in apparent good order and condition when they were shipped. The result of that is to establish an obligation upon the shipowners; that is to say, they commit a breach of their implied contract by not delivering the goods in that

condition in which they must be taken to have been when they arrived on board the ship.

Then the question arises whether the shipowners are protected from the claim for the consequences of delay. I have dealt first with the question whether the goods were, or must be taken to have been, delivered to the ship in a damaged condition, because I think the contractual rights of the parties are founded on that basis; but the actual damage arose because the goods were taken out of the ship and reconditioned and, after some three months, loaded upon another ship and so brought to this country. Are the shipowners entitled to rely upon any of the exceptions in respect of that delay? When the matter is ventilated it appears that the only condition upon which they can rely is delay caused by prolongation of the voyage. I agree with Scrutton L.J. that it is not necessary to determine that matter, but as at present advised I think this is not a case of prolongation but rather of postponement of the voyage. I have considerable difficulty in seeing that in the month of June, when these goods were neither on the *Bernini* nor on the *Cavour*, but were lying in a warehouse, or were in the course of being reconditioned, they were on any voyage at all. In my opinion they did not start on their voyage until they got on the *Cavour*, and therefore what really happened was that the voyage was postponed rather than prolonged. But even if it was prolonged I think the delay was such as to substitute an entirely different voyage for that contemplated by the bill of lading, which related to a voyage either by the *Bernini* or by some other ship sailing at or about the same date. If that is so the delay amounted to a deviation, and the shipowners could not rely upon the exception, and I think that applies to the implied contract as much as it would to the original contract in the bill of lading. I do not propose to deal with the issues of fact that have been decided by the learned judge. I am content to say that I see no reason for differing from his conclusions. The result of that is that his judgment must stand. I am not quite sure whether he dealt with the question of the altered voyage, but apart

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from that I entirely agree with the reasons he has given for his decision. I think therefore that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Stokes & Stokes, for Cameron, MacIver & Co., Liverpool.*

Solicitors for respondents: *William A. Crump & Son.*

W. H. G.

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[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* JAMES THOMAS HALES.

Criminal Law—Trial—Sentence—Pronouncement—Presence of Prisoner—Reply—Right of—Where inadmissible Document read as Evidence for Defence.

Where a defendant has been convicted on a charge of felony at assizes and sentence has been postponed, the judge has no jurisdiction, at assizes held at another place during the same circuit, to pass sentence upon the defendant in his absence.

Although counsel for the prosecution has a right to reply where a document admissible in evidence has been put in evidence for the defence, he has no right to do so where by leave of the judge a document has been read for the defence embodying the statements of and signed by a person who might have been called but has not been called to give direct oral testimony.

APPEAL against conviction and sentence.

The defendant, James Thomas Hales, was charged on indictment with the alleged larceny on April 17, 1923, at Bicester in the county of Oxford, of a motor cycle and side-car. He pleaded not guilty.

On October 18, 1923, the case came on for trial at Oxford before Shearman J., the judge engaged in discharging the business of the Oxford circuit. The prosecution was represented by counsel, and the defendant conducted his own defence. On behalf of the prosecution evidence was called with a view to showing (inter alia) that the defendant and certain other persons were concerned in stealing the motor

cycle and side-car in question, that when the other persons in that car were being pursued by a police motor cycle, the defendant on his motor cycle endeavoured to impede the pursuit, and that when the police motor cycle overtook the other vehicles the defendant jumped off his motor cycle and over a hedge about 2 feet high at the side of the road. The defendant gave evidence on his own behalf with a view to showing (inter alia) that these statements were untrue. As to the allegation that he had jumped off his motor cycle and over the hedge, the defendant stated that it would have been impossible for him to do so owing to a permanent injury to his knee which he had sustained during the war; that on the previous day he had obtained from a qualified medical man a certificate in writing which bore out his statement; and that, believing that that certificate was sufficient evidence, he had not called the doctor who made it, or any doctor, to give oral evidence. The learned judge pointed out to the jury that the written statement of a person who might have been called to give direct oral testimony was not admissible in evidence; but, being anxious that nothing should be suppressed that might assist the defendant, he gave the defendant leave to read the certificate. The defendant accordingly read the certificate to the jury, but it was not exhibited in evidence. The certificate was as follows: "I certify [that] I to-day saw and examined James Thomas Hales as regards an old injury to his left knee. I found the joint considerably stiffened as the result of an old and severe fracture of the knee-cap. This bone had been repaired some time ago by a surgical operation. I consider that the joint which has been stiff for some considerable time is likely to remain stiff. He will be able to run with difficulty, and run the risk of re-fracture of this bone and also of fracture of the other knee-cap in case of sustained effort. I do not think he would be capable of jumping with the injured limb." The doctor signed the certificate, adding to his signature his qualifications of M.D. and M.R.C.S. On the ground that the defendant had read that certificate, counsel for the prosecution claimed the right to reply, and made a second speech to the jury.

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The jury returned a verdict of guilty against the defendant. As an appeal by the defendant to the Court of Criminal Appeal was then pending against a previous conviction on September 21, 1923, for the alleged receiving of a motor car, and a sentence of nine months' imprisonment, the learned judge postponed sentence in the present case until the result of that appeal should be known.

On October 25, 1923, at Worcester, on the same circuit, the defendant not being present in Court, his Lordship passed sentence upon the defendant of fifteen months' imprisonment, to run concurrently with his previous sentence.

The defendant, having obtained leave, gave notice of appeal.

H. H. Maddocks for the defendant, appellant. The appeal should be allowed against both the conviction and the sentence on the ground that the proceedings were irregular in two respects.

The learned judge passed sentence upon the defendant in his absence, and in so doing he acted without jurisdiction. It is an established rule that on a charge of felony the defendant cannot be tried or sentenced in his absence: see *Rex* v. *Bithell* (1) and *Rex* v. *Harris and Duke.* (2)

Further, counsel for the prosecution was allowed to make a second speech, though he had no right to do so. Where a document has been put in evidence for the defence he has, no doubt, a right to reply; but here no document was put in evidence for the defence. It is true that the defendant was allowed to read a certificate to the jury, but that certificate was not admissible in evidence and was not exhibited.

A. Ralph Thomas for the prosecution. The proceedings were not irregular in either of the respects mentioned. The learned judge was entitled to sentence the defendant in his absence. On a charge of felony the defendant may now be both tried and sentenced in his absence: *Reg.* v. *Berry* (3); *Rex* v. *Richardson* (4); and Stephen's Digest of Criminal Procedure, art. 302. The two cases cited on behalf of the

(1) (1695) 1 Ld. Raym. 47.
(2) (1697) 1 Ld. Raym. 267.
(3) (1897) 104 L. T. Jo. 110.
(4) (1913) 29 Times L. R. 228.

prosecution in order to show that a prisoner could not be sentenced in his absence are not very definite authorities for that proposition; and further they are old cases which were decided at a time when the penalties for felony were in many cases more severe than they now are, and a distinction was drawn between trial and sentence which has now become merely technical.

Further, if it be the rule that a prisoner cannot be tried for felony in his absence, it does not follow that he cannot be sentenced in his absence, because the sentence, though part of the proceedings, is not part of the trial which is concluded when the verdict is given. Though this Court should be of opinion that the sentence was pronounced without jurisdiction and should be quashed, the defendant need not remain unsentenced, because this Court has power under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 3, to pass another lawful sentence in substitution for the sentence quashed; or another sentence could be passed by the next judge appointed to the Oxford circuit: see *Rex* v. *Pepper*. (1)

[LORD HEWART C.J. The Act of 1907, s. 11, sub-s. 2, provides that the power of this Court to pass any sentence under that Act may be exercised notwithstanding that the appellant is not present; and that provision would seem to imply that in other cases the prisoner must be present when sentence is pronounced.]

That provision shows that the law as to the presence of the accused has changed, and that his presence is not now so essential as formerly.

Secondly, counsel for the prosecution was entitled to make a second speech to the jury. It is a settled rule that where a witness other than the defendant himself is called for the defence, or a document is put in evidence for the defence, counsel for the prosecution has a right to sum up or reply: Archbold's Criminal Pleading, 26th ed., p. 205; Russell on Crimes, 8th ed., p. 1835. Here the defendant tendered in evidence a medical certificate which was relevant as tending

(1) [1921] 3 K. B. 167.

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to show that he had sustained injuries in the war which negatived the allegation of the prosecution that he had jumped over the hedge, and he was allowed to read that certificate to the jury, though it was not exhibited; and in these circumstances counsel for the prosecution was entitled to make a second speech.

The county in which the defendant was sentenced was included in the same circuit as that in which he was tried, and that being so it was immaterial that it was not the same county. The commission of oyer and terminer gives the judge to whom it issues power to try a case in any of the counties to which it extends, and provided the jury remains the same, the trial may be had partly in one of these counties and partly in another. It is submitted that the sentence imposed upon the defendant in the present case should not have been made to run concurrently with, but consecutively to the sentence which he was already serving: see *Rex* v. *Woolley*. (1)

The Court (LORD HEWART C.J., SANKEY and SWIFT JJ.) allowed the appeal.

LORD HEWART C.J. delivered the following judgment of the Court: In this case the defendant was tried for stealing a motor-cycle and side-car. The first part of the proceedings took place on October 19, 1923, at Oxford assizes, where he was convicted of the offence charged. At that time an application by the defendant in respect of another case was pending before this Court, and the learned judge, out of consideration for the interests of the defendant, postponed sentence until the result of that application should be known. Afterwards on October 25 at Worcester assizes during the same circuit sentence was passed upon the defendant in his absence. In the opinion of this Court that could not properly be done. The charge against the defendant was one of felony, and the Court has no jurisdiction to pass sentence in respect of a charge of that nature in the absence of the prisoner.

(1) (1909) 3 Crim. App. R. 57.

There was also another slip. The rule is that if any witness other than the defendant himself is called for the defence, or if any document is put in evidence for the defence, counsel for the prosecution has a right to make a second speech; but if no such witness as that be called or document put in evidence, then counsel for the prosecution has no right to a second speech. In this case the defendant, who conducted his own defence, called no witness other than himself for the defence, and put in no document which was admissible in evidence. It is true that by leave of the judge he read a portion of a document to the jury, but that document was not properly admissible in evidence and was not exhibited. Counsel for the prosecution nevertheless made a second speech to the jury and summed up his case.

In these circumstances the conviction cannot stand and must be quashed.

Solicitor for defendant: *Registrar of Court of Criminal Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

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STEPHENSON *v.* THOMPSON (1).

[1923. S. No. 1518.]

Bill of Sale—Excepted Documents—"Transfers of goods in the ordinary course of business of any trade or calling"—Growing Crop—"Goods"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 10.

An agreement transferring a growing crop is not a transfer of "goods" within the meaning of s. 4 of the Bills of Sale Act, 1878, and is not therefore excepted from the definition of "bill of sale" in that section as being a "transfer of goods in the ordinary course of business of any trade or calling."

Decision of the Privy Council in *Tennant* v. *Howatson* (1888) 13 App. Cas. 489 followed.

ACTION tried before Shearman J.

The facts of the case were admitted. A farmer, one Frank Brooks, sold a growing crop of potatoes at Long Sutton, Lincolnshire, to the defendant, Henry Thompson, who was also a farmer, for 3,000*l.*, which was paid, the transaction being an out and out sale for cash. The agreement was dated May 12, 1922, and was neither attested nor registered as a bill of sale. On October 24, 1922, Brooks executed a deed of arrangement for the benefit of his creditors, and the plaintiff, Joseph Stephenson, was appointed trustee. The potatoes were at that time still in the ground or on the premises of Brooks, the vendor. The defendant was subsequently allowed to remove them without prejudice to the legal rights of the plaintiff, and the dispute concerned the proceeds of the sale of the potatoes, 944*l.*, balance remaining after deduction of expenses.

The plaintiff claimed the potatoes or their proceeds on the ground that they were the subject matter of an unattested and unregistered bill of sale, which under s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), was void as against him, the potatoes being in the apparent possession of Brooks, the maker of the bill of sale. The defendant claimed the potatoes as purchaser.

Hansell and *W. N. Stable* for the plaintiff. The agreement of May 12 is a bill of sale within s. 4 of the Bills of Sale Act,

(1) Reversed in C. A. [1924] W. N. 140.

1878 (41 & 42 Vict. c. 31), and not having been attested or registered as directed by s. 10 of the Act is deemed under s. 8 fraudulent and void as against the plaintiff, the trustee of Brooks' estate, the potatoes being in the "apparent possession" of Brooks, the maker of the bill of sale. But it is said that this agreement is not a bill of sale within s. 4, because exempted under the same section as a "transfer of goods in the ordinary course of business." But growing crops, though "personal chattels" by the definition in s. 4, are not "goods" within the earlier part of the section: *Tennant* v. *Howatson* per Lord Hobhouse, delivering the judgment of the Privy Council (1) interpreting a Colonial ordinance couched in exactly the same terms as this part of s. 4. In *Brantom* v. *Griffits* (2) growing crops were held not even to be "personal chattels," which is only a species of the general term "goods," and historically no doubt the words "growing crops" were introduced into s. 4 of the Act of 1878 in consequence of this decision. This document was not therefore a transfer of "goods" and was not exempted from the definition of "bill of sale" in s. 4 of the Act.

Dyer K.C. and *Sandlands* for the defendant. It is agreed that the potatoes were in the apparent possession of Brooks, but the defendant claims them under the agreement of May 12 as purchaser. That agreement is not a bill of sale within the definition in s. 4 of the Bills of Sale Act, 1878, because it is exempt as being a "transfer of goods in the ordinary course of business." These growing potatoes were "goods" within the meaning of those words. They clearly were chattels by the definition, and at common law "goods" and "chattels" were practically synonymous: see Sheppard's Touchstone, 7th ed., vol. ii., p. 447.

In *Evans* v. *Roberts* (3) growing potatoes were held to be within the words "goods, wares and merchandises" in s. 17 of the Statute of Frauds (29 Car. 2, c. 3). *Mayfield* v. *Wadsley* (4) shows that growing crops might be recovered under a count for goods bargained and sold. That being the

(1) 13 App. Cas. 489, 493.
(2) (1877) 2 C. P. D. 212.
(3) (1826) 5 B. & C. 829.
(4) (1824) 3 B. & C. 357.

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common law, s. 62 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), makes "goods" to include "emblements [and] industrial growing crops," and to prevent confusion "goods" in the Act of 1878 should be given the same meaning. No doubt the decision of the Privy Council in *Tennant* v. *Howatson* (1) is against the defendant's contention, but the document in that case was not an absolute but a conditional bill of sale. Moreover, a decision of the Privy Council is not binding on this Court.

[Benjamin on Sale, 6th ed., p. 206, was referred to.]

Hansell replied.

SHEARMAN J. This case is not free from difficulty, but I have come to the conclusion that the plaintiff is entitled to judgment. I do not think it is open to me to decide otherwise, unless I disregard a decision which, though technically not binding on me, I am bound to regard with very great respect.

The facts are quite simple. A farmer, one Brooks, in the ordinary course of his business, sold his growing crop of potatoes to another farmer, Thompson, the defendant. The agreement to sell—which it is quite clear is a document of sale—says: "The vendor agrees to sell and the purchaser agrees to purchase all the potatoes which have already been planted by the vendor during the present year on his farm situate in Terrington Marsh in the County of Norfolk for the sum of 3,000*l.* now paid." Until they were ready the vendor was to cultivate and manage the potatoes, and the purchaser was at liberty to enter on to the land to inspect them, and they were to be dug and delivered when they were fully grown. This document was not registered as a bill of sale, nor was it attested in the manner provided by s. 10 of the Bills of Sale Act, 1878. Subsequently to the above sale the vendor executed an assignment of his property for the benefit of his creditors, and the plaintiff became the trustee, and in that capacity claims the potatoes, while the defendant, as the purchaser of the potatoes, also claims them.

(1) 13 App. Cas. 489.

I have to decide whether the potatoes—or rather the money representing them, for they have been sold—passed to the trustee under the deed of assignment, or whether they belong to the purchaser, the defendant.

By s. 4 of the Bills of Sale Act, 1878, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include" certain documents which I will deal with later. The section goes on to say: "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." The historical reason for inserting the words "(when separately assigned or charged) fixtures and growing crops" was that it had previously been decided by the Court of Appeal in *Brantom* v. *Griffits* (1) that growing crops were not personal chattels within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), then in force. Cockburn C.J. in delivering the judgment of the Court said (2): "'Personal chattels' is confined therefore, in my opinion, to goods capable of present delivery and removal. Now it is impossible that there can be present delivery of growing crops." The result was that in the Act of 1878 things were added to the description of personal chattels which for bill of sale purposes only were to be deemed to be personal chattels. Then s. 8 of the Act of 1878 enacts that every bill of sale shall be duly attested and registered, and if not duly attested and registered within seven days it shall be deemed fraudulent and void,

(1) 2 C. P. D. 212. (2) 2 C. P. D. 212, 214.

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"so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment . . . . and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale."

On October 24, 1922, the year in which this assignment was executed, the vendor executed an assignment for the benefit of his creditors, and the plaintiff became trustee. At that time it is agreed that the potatoes were still in and upon the freehold land of the vendor. The plaintiff, the trustee, says that this is a bill of sale neither duly attested nor registered, and that therefore it is void as against him as provided by s. 8 of the Act of 1878. The defendant contends that there are provisions in s. 4 of the Act of 1878 which enact that certain documents shall not be bills of sale, and that this document is one of them. The exceptions are (inter alia) "transfers of goods in the ordinary course of business of any trade or calling." It is said on the defendant's behalf that the words "transfers of goods in the ordinary course of business of any trade or calling" cover this document, and that this document is such a transfer. It is contended that "goods" is a word of the widest import, that "goods and chattels" ever since the time of Sheppard's Touchstone (1) have included every kind of property which is not real property. In s. 62 of the Sale of Goods Act, 1893, there is an express definition of "goods," showing that the word includes emblements and industrial growing crops, and it is said that in interpreting an Act passed in 1878 I ought not to disregard the fact that a statute of 1893 defines "goods" as including growing crops. But I think I must disregard it. It is always unfortunate when technical and limited meanings are given to general words for the purpose of a particular Act, and the result is often confusion, for something may be "goods" for one purpose and not for

(1) See vol. i., p. 97, and vol. ii., p. 447 (7th ed.).

another. I have to confine myself to the decided cases in determining the meaning of "goods" in the statute of 1878.

Before the passing of the Sale of Goods Act, 1893, I think the question whether growing crops were goods was a matter of doubt; and Lord Blackburn in his book on Contract of Sale, 1st ed., pp. 9 et seq., expressed great doubt about it, and there was no authoritative decision. I have no doubt therefore that that was the reason why "goods" were expressly included in the definition in s. 62 of the Act of 1893. Therefore in 1878 it was still a matter of doubt whether growing crops were "goods," and I think the authorities, including *Brantom* v. *Griffits* (1), decided that they were not personal chattels, and in that state of things the Bills of Sale Act, 1878, was passed. In my judgment on the true construction of s. 4 of that Act growing crops are expressly included in what are taken to be personal chattels within the meaning of the Act, but they are not goods. But I also find a decision of the Privy Council in *Tennant* v. *Howatson* (2) to the same effect, though no doubt the bill of sale in that case was a conditional bill. The question was whether, being a bill of sale of growing crops, it ought to be registered under a Colonial ordinance which repeated word for word the provisions of s. 4 of the Bills of Sale Act, 1878. Lord Hobhouse, who delivered the judgment of the Judicial Committee (including, it is true, other reasons for the decision independent of this particular point), said (3): "Their Lordships think that the word 'goods' in this context does not include growing crops." If so, the contention raised by Mr. Dyer on behalf of the defendant that he can hold these goods as being the subject of a "transfer of goods in the ordinary course of business," fails. I do not think I could disregard that authority, even were I inclined to do so. But, in my opinion, that decision is in accordance with the plain and necessary construction of the definitions in s. 4 of the Act of 1878.

In my judgment, therefore, this document is a bill of sale

(1) 2 C. P. D. 212. (2) 13 App. Cas. 489.
(3) 13 App. Cas. 493.

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which requires attestation and registration under the Bills of Sale Act, 1878. It has not been so attested or registered, and it is therefore void as against the plaintiff, who must have judgment accordingly.

Judgment for plaintiff.

Solicitors for plaintiff: *Smith, Rundell, Dods & Bockett, for Calthrop & Leopold Harvey, Spalding.*

Solicitors for defendant: *Smiles & Co., for Mossop & Mossop, Holbeach.*

W. L. L. B.

C. C. A.

1924

Jan. 21.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* YASUKICHI MIYAGAWA.

Criminal Law—Dangerous Drugs—"Procuring" Morphine—Shipping Documents in this Country, but not Drug itself—Dangerous Drugs Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 46), *ss.* 6, 7, 8—*Regulations for Manufacture, Sale, etc., of Cocaine, etc., dated May* 20, 1921—*Dangerous Drugs and Poisons (Amendment) Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 5), *s.* 2, *sub-s.* 1 (*d*).

By s. 6 of the Dangerous Drugs Act, 1920, the importation into, or the export from, the United Kingdom of certain drugs, including morphine, except under licence, is made unlawful; by s. 7 authority is given for regulations being made for controlling the manufacture, sale, possession and distribution of those drugs; and by a Regulation made under that section, "no person shall supply or procure or offer to supply or procure any of the drugs to or for any person whether in the United Kingdom or elsewhere," unless he is duly licensed to do so.

The appellant, who had an office in London, and who had no licence to deal in morphine, arranged with a firm in Switzerland for the despatch from that country to Japan of a quantity of morphine. The morphine never was in this country, but bills of lading and other shipping documents in respect of the consignment were received by the appellant in London:—

Held, that the appellant was properly convicted of having "procured" the morphine in London within the meaning of the Regulation.

APPEAL against conviction.

The prisoner was tried at the Central Criminal Court on an indictment the first count of which (the only one material for the purposes of this report) was as follows:—

"Statement of Offence.

"Unlawfully procuring morphine, contrary to s. 7 of the Dangerous Drugs Act, 1920, and Regulation Number 3 of the Regulations dated May 20, 1921, made by the Secretary of State under the said Act.

"Particulars of Offence.

"Yasukichi Miyagawa, between September 1 and November 5, 1923, in the City of London, unlawfully procured 500 pounds weight of morphine hydrochloride for Miyagawa & Co., of Kobe, Japan."

The case for the prosecution was that the prisoner, who had an office in Ludgate Hill, was in correspondence with a firm in Switzerland regarding the purchase of a quantity of morphine for despatch from that country to Japan, that he purchased morphine from or through that firm, and that he received at his office in Ludgate Hill the bills of lading, an insurance certificate, particulars of shipment, and an invoice in respect of a shipment of the morphine from Marseilles to Kobe, Japan.

It was submitted for the prisoner at the trial that there was no case to go to the jury, as the evidence showed no offence against the Act and Regulations, which, it was contended, were aimed only against the procuring of dangerous drugs in this country, and in this case the drug in question never was in the United Kingdom.

The Recorder ruled against this submission, and in his summing up he directed the jury that, although the morphine referred to in the first count never was physically in this country, as the bills of lading had come to this country, and the work, or a part of the work, with regard to the sending of the morphine to Japan had been done in the city of London, that was sufficient in law to amount to "procuring" the drug within the meaning of the regulation.

The jury convicted the prisoner, who was sentenced to three years' penal servitude and recommended for deportation.

The prisoner appealed.

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Sir Henry Curtis Bennett K.C., *Whiteley K.C.* and *Frampton* for the appellant. The question turns upon the true construction of certain sections of the Dangerous Drugs Act, 1820, and the Regulations made thereunder. (1) What is aimed at by the Act and Regulations is the importing of dangerous drugs into or exporting them from this country. Therefore, to constitute an offence under the Act or Regulations the drugs must be physically in this country, otherwise there was no need for the amending Act—the Dangerous Drugs and Poisons (Amendment) Act, 1923, which, by s. 2, sub-s. 1 (*d*), makes it an offence if a person "does any act preparatory to, or in furtherance of, any act which, if committed in Great Britain, would constitute an offence" against the Act. As in this case the morphine was not in this country and was never intended to be brought here there was no evidence to go to the jury on the first count, and the Recorder ought to have so held.

Travers Humphreys and *Roome* for the Crown were not called upon.

The judgment of the Court (LORD HEWART C.J., AVORY and MCCARDIE JJ.) was delivered by

LORD HEWART C.J., who, after stating the facts, said: The submission that there was no evidence to go to the jury in proof of the allegation that the appellant committed the offence charged, depends upon the interpretation of the term "procure" in art. 3 of the Regulations of May 20, 1921. The argument is based upon the proposition that within

(1) Dangerous Drugs Act, 1920, s. 6: "It shall not be lawful to import or bring into, or to export from, the United Kingdom any drug to which this Part of this Act applies except under licence."

Sect. 7, sub-s. 1: "For the purpose of preventing the improper use of the drugs to which this Part of this Act applies, provision may be made by regulations for controlling the manufacture, sale, possession and distribution of those drugs. . . ."

By s. 8 morphine is included among the drugs to which the Act applies.

Reg. 3 of the Regulations, dated May 20, 1921, made under s. 7 of the Act of 1920, provides that "no person shall supply or procure or offer to supply or procure any of the drugs to or for any person, whether in the United Kingdom or elsewhere," unless he is duly licensed to do so.

the meaning of the Dangerous Drugs Act, 1920, and the Regulations made thereunder—whatever may be said of the Dangerous Drugs and Poisons (Amendment) Act, 1923—there cannot be a "procuring" by a person in this country unless the drugs, the subject of the charge, are physically, or are intended to be physically, in this country. That proposition derives no support either from a consideration of the regulation in question, or from a comparison of, or contrast between, the Acts of 1920 and 1923. It is quite true that the Act of 1923 throws the net more widely than did the Act of 1920, but that is obviously because experience showed that there might be an act done of a preparatory character which the Legislature thought right to penalise, although it might fall short of an act, or an attempt to commit an act, prohibited by the Act of 1920. It is said that the Recorder misdirected himself and the jury in point of law in the passage from his summing up which has been read. We do not think so. No unfavourable criticism can be made upon the interpretation which the Recorder put upon the regulation. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellant: *Percy Robinson & Co.*
Solicitor for Crown: *Director of Public Prosecutions.*

J. S. H.

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Jan. 24, 25.

LEWISHAM UNION GUARDIANS, APPELLANTS *v.* NICE, RESPONDENT.

Poor Law—Wilful Refusal or Neglect of Person to maintain himself and Family —Refusal of Work at lower than Trade Union Rate of Wages—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

On an appeal to quarter sessions by N. against his conviction under s. 3 of the Vagrancy Act, 1824, for wilfully refusing and neglecting to maintain himself and his family whereby he and they became chargeable to the appellant union, it was proved that N. was able to work and was offered suitable work at a weekly wage of 2*l.* 6*s.*; that he worked at that wage for several days and then declined to do so any longer, as the rate of pay was less than the current trade union rate—namely, 3*l.* 2*s.* 8*d.*; and that in consequence of his refusal to work he was unable to maintain himself and his family, whereby they became chargeable to the appellant union. In his evidence N. stated that he was anxious to earn his own living, and that he was willing to work for 2*l.* 6*s.* a week and keep his wife and family, but that he was informed by his trade union that he must not work for less than the trade union rate. Evidence was also given by a trade union official that if N. had continued to work for 2*l.* 6*s.* a week he would have been challenged by his union, would have had to give an explanation, and might have been reprimanded or fined or expelled from the union, which expulsion would make it difficult for him to get work in the future. On that evidence quarter sessions were satisfied that N. by continuing to work for 2*l.* 6*s.* a week would have been, in the circumstances, losing chances of bettering himself and would have materially hurt his chances of employment in the future; they accordingly quashed the conviction:—

Held, that it was open to quarter sessions on the facts before them, and having regard to *Poplar Guardians* v. *Martin* (1904) 68 J. P. 526; [1905] 1 K. B. 728 to come to the conclusion they did.

CASE stated by London quarter sessions.

On May 9, 1923, the respondent Nice was convicted at Greenwich police court, under s. 3 of the Vagrancy Act, 1824 (1), "of being an idle and disorderly person for that he on April 6, 1923, at the parish of Lewisham in the county of London being a person able to work and wholly to maintain

(1) Vagrancy Act, 1824, s. 3: ". . . . Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish . . . . shall be deemed an idle and disorderly person," and be liable to one month's imprisonment.

himself and his family unlawfully and wilfully did refuse and neglect so to do by which refusal and neglect himself and his family whom he was then legally bound to maintain became and then were chargeable to the common fund of the Lewisham Union."

From that conviction the respondent appealed to quarter sessions, and at the hearing of the appeal it was proved that the respondent was a skilled navvy able by work to maintain himself and his family; that the respondent and his family became on March 1, 1923, chargeable to the Lewisham Union and that he received relief from the relieving officer on various dates up to and including March 29; that on March 22 the appellants issued a circular letter to, among others, the respondent, stating that they had arranged with the Lewisham Borough Council that a number of unemployed men should be afforded the opportunity of work at a wage of 2*l.* 6*s.* per week of 47 hours, instead of receiving assistance from the rates, and asking the respondent to report himself at the town hall yard, Catford; that the respondent started on March 27 to do the work thus offered at the rate mentioned, which work was suitable for him and was work which he was capable of doing; that the respondent worked on several days, but on March 31 he declined to continue to do so, as the rate of pay was less than the current trade union rate of wages for such work; and that in consequence of his refusal to perform the work he was unable to maintain himself and his family, who all became chargeable to the union and obtained relief on April 6, 11 and 13.

The respondent gave evidence that when he received the above mentioned circular letter he was anxious to earn his own living and to keep his wife and family by work, and accordingly accepted the offer contained in the circular letter, and continued to work till Saturday, March 31, but that on that day, after receiving his pay, he saw the secretary of his trade union, by whom and the other officers he was told that he must not work for less than the current trade union rate of wages. The respondent further stated that he was quite willing to work for 2*l.* 6*s.* a week and to keep his

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wife and family on that wage, and that his sole reason for his refusal to continue work was that his trade union would not allow him to do so at that wage; that the work he was doing was skilled work, and that if he had continued to work in those circumstances for 2*l.* 6*s.* a week he would expect to be black-legged in the future—that is, that he would be unable to get employment.

The district secretary of the respondent's trade union proved that in March, 1923, the trade union rate of wage per week of 47 hours for the class of work on which the respondent was being employed was 3*l.* 2*s.* 8*d.*, that if the respondent had continued to work for 2*l.* 6*s.* a week he would have been challenged by his union, would have had to give some explanation, and might have been reprimanded, or fined, or expelled from the union, which expulsion would make it difficult for him to get work in the future. But the witness could not say definitely what would have happened to the respondent, inasmuch as he (the witness) would not be the deciding party.

Quarter sessions were satisfied that the respondent by continuing to work after March 31 for 2*l.* 6*s.* a week would have been, in the circumstances, losing chances of bettering himself, and that on March 31 he was engaged on employment which in fact would have materially hurt his chances of employment in the future. Quarter sessions accordingly allowed the appeal and quashed the conviction. The question was whether they were right in law in so doing.

Schiller K.C. and *Travers Humphreys* for the appellants. As the work offered to the respondent was suitable for him and he was physically able to do it, his refusal to continue working, whereby he and his family became chargeable, amounted to a wilful refusal or neglect to maintain himself and his family within s. 3 of the Vagrancy Act, 1824. "Wilful" is something to which the will is a party: per Bramwell L.J. in *Lewis* v. *Great Western Ry. Co.* (1), and in this case the respondent's will went with his refusal to

(1) (1877) 3 Q. B. D. 195, 206.

continue to work. If a man has a bona fide belief that a state of facts exists which, if it did exist, would afford an excuse for his not supporting his wife and family, he cannot be convicted under s. 3: *Morris* v. *Edmonds* (1), but that is as far as the authorities go. In *Roberts* v. *Regnart* (2) the bona fide belief of a man that he was no longer bound to maintain his wife after her removal by her relatives from the asylum where she had been maintained partly at his expense, afforded no defence to proceedings against him under s. 3 of the Act of 1824. An able-bodied man cannot, for this purpose, justify his refusal to work on the ground that he cannot obtain work on terms which, as between him and his employer, he considers reasonable, or because he thinks that by standing out he can obtain better terms than those offered him: per Lindley M.R. in *Attorney-General* v. *Merthyr Tydfil Union*. (3) That is precisely in point in this case. It is true that in the later case of *Poplar Guardians* v. *Martin* (4) a Divisional Court held that in proceedings under s. 3 of the Act of 1824 the magistrate may consider the nature of the work offered and the conditions attached to it in deciding whether there has been on the part of the person accused a wilful refusal or neglect to maintain himself. That case was remitted to the magistrate to be reheard, and it came a second time before the Divisional Court (5), when it appeared that the work offered to the man in question was subject to the condition that he would abstain from intoxicating liquor and would attend certain religious meetings. The Divisional Court held that to constitute a wilful refusal or neglect within s. 3 the conditions attached to the offer of work must relate to the work itself or to the workman's conduct in its performance, and that a refusal to accept work on the particular conditions did not amount to a wilful refusal or neglect on the part of the person to maintain himself and that he was therefore not liable to be convicted as an idle and disorderly person. Conditions of the kind sought to be attached to

(1) (1897) 77 L. T. 56.
(2) (1921) 86 J. P. 77.
(3) [1900] 1 Ch. 516, 542.
(4) 68 J. P. 526.
(5) [1905] 1 K. B. 728.

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the work offered in that case cannot for this purpose be imposed. Here there was nothing analogous to what was done there. Where the work itself is, as between employer and employee, free from conditions, conditions sought to be imposed by an extraneous body, as the trade union in this instance, cannot be regarded. If the view taken by quarter sessions is right a trade unionist commits no offence against the section by refusing to work in the circumstances present in this case, whereas a non-unionist by refusing to work in precisely the same circumstances would be committing an offence. That cannot be the correct view of the section. The Legislature intended that where work of a suitable character is offered at a remuneration sufficient to maintain, or partly maintain, the particular person and his family and he refuses to take it upon a ground unconnected with the work itself he is to be punished if he becomes chargeable to the parish.

Purchase K.C. and *G. F. L. Bridgman* for the respondent. The question is, on the facts proved, can the respondent be fairly described as an idle and disorderly person? The quarter sessions who, it must be remembered, were retrying the case, found that on the facts established before them the respondent could not be so described, because he had not "wilfully" refused or neglected to maintain himself and his family. There was ample evidence upon which the quarter sessions could so find. The section in question was aimed at idle and disorderly persons who without excuse wilfully refuse to maintain themselves, and not at honest and respectable men who really desire to maintain themselves and their families, but who, in circumstances over which they have no control, are unable to do so. *Poplar Guardians* v. *Martin* (1) supports the view taken by the respondent that, in the circumstances, he was entitled to decline to continue working at the wage offered: see especially the observations of Kennedy J. to the effect that in his opinion a man was not bound to accept an offer of work at a wage which would maintain himself and his family, but by accepting which he

(1) 68 J. P. 526.

might lose chances of bettering himself. It must be borne in mind that the respondent's responsibility to maintain his wife and family lasts not for a few days or weeks only, but may be lifelong; and in view of that he is entitled to have regard to the whole of the circumstances in considering whether or not he will accept an offer of work.

Schiller K.C. in reply. While a person who wilfully refuses or neglects to maintain himself and his family may not be what would ordinarily be called "an idle and disorderly person" he is, by s. 3 of the Act of 1824, to be deemed to be so. The fact that the respondent may have wished to maintain himself and family by work is immaterial if his will is not to do so. In *Attorney-General* v. *Merthyr Tydfil Union* (1) the observations of Lindley M.R. point to the view that able-bodied men on strike might be punished if their families became chargeable to the parish.

LORD HEWART C.J. This is a case stated by quarter sessions on appeal by the present respondent, Nice, from a conviction at Greenwich police court under s. 3 of the Vagrancy Act, 1824. When that section is looked at, without reference to anything that has happened since 1824, it will be seen that in order that a man may be convicted under it three ingredients must be present: (1.) the man must be able to work and wholly or partly to maintain himself and his family, (2.) he must wilfully refuse or neglect to maintain himself and his family, and (3.) by reason of his refusal or neglect, he and his family, whom he was legally bound to maintain, must become chargeable to the common fund of the poor law union. [His Lordship stated the facts set out in the case and continued:] In considering the question whether upon these facts it was open to quarter sessions to allow the appeal by Nice and quash the conviction, our attention was directed to a number of cases, but of these I propose to refer to two only—*Attorney-General* v. *Merthyr Tydfil Union* (2) and

(1) [1900] 1 Ch. 516, 548–9. (2) [1900] 1 Ch. 516

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Poplar Guardians v. *Martin*. (1) The first of these cases, it should be observed, did not turn upon the construction of s. 3 of the Vagrancy Act, 1824; it raised certain questions with reference to the position of guardians when asked to give relief to able-bodied persons who were unemployed by reason of a strike, although it is quite true that in the course of his judgment in that case Lindley M.R. made certain observations concurred in by Rigby and Vaughan Williams L.JJ., which may be thought to have a bearing upon the meaning of the section we have to construe. That case, however, was carefully considered some years later in *Poplar Guardians* v. *Martin* (2), although there too the particular question now before us was not raised. But, nevertheless, it was incumbent upon the Court in that case to consider the kind of material which may properly be taken into account on an information laid under s. 3 of the Vagrancy Act, 1824. In his judgment Lord Alverstone C.J. said (3): "I do not want to criticise the learned magistrate's reasons, but I certainly think some of them with regard to the opportunity that would be given to persons outside to compel labourers to come and work for them at certain terms seem rather far fetched," and, again, "I entirely concur in what my brother Phillimore has said in the course of the argument, that if the condition of work is that a man must bind himself for a definite time so that he would not be able to go away and take work elsewhere, or that he must submit himself to matters that a man may properly take objection to, such conditions should be considered with regard to the question of whether there has been a wilful neglect to maintain." In the same case Kennedy J. said: "There are many circumstances—it would be absurd to try to enumerate, even the majority of them—which to my mind would justify a magistrate in saying, although the man is able-bodied, that he refused to convict him of wilfully refusing or wilfully neglecting to maintain himself. One of them, I think, would be, speaking for myself—and I understand my Lord takes entirely the

(1) 68 J. P. 526; [1905] 1 K. B. 728.

(2) 68 J. P. 526.

(3) 68 J. P. 527.

same view—when a man being put in the pinch of a particular necessity to ask for poor relief was met by an alternative of signing an agreement of service, for any lengthened period, at a rate of wage which it might be possible to say would help to maintain him and not charge the ratepayers with his keep, but which would bind him to serve possibly at an uncongenial trade and occupation for an indefinite time and lose chances of bettering himself. If a man declines under those circumstances to sign such an agreement, if I were the magistrate, I should be slow to say he was wilfully refusing or neglecting to maintain himself." If that is right, how much slower would the learned judge have been to say that the magistrate who had taken that view was necessarily and as a matter of law wrong? "In the same way," Kennedy J. continued, "if it were a condition of the employment, that he should go to religious or other services to which by conscience he was averse, I should think that would be very good ground indeed for a magistrate saying that he declined to convict, if the only opportunity of work offered was work under those conditions. Then suppose a man, whose ordinary occupation had been one involving delicate manual industry, had by the stress of hard times in that industry or otherwise been obliged to come on the rates, if that man was offered and he refused some employment, which would practically destroy, or at any rate injure his opportunities of earning a livelihood in that skilled industry to which he was accustomed—an employment which in fact would ruin his chances for the future—I think that is a matter again that might properly be considered by the magistrate in determining whether he had wilfully neglected to maintain himself." Mr. Purchase for the respondent applies those passages, mutatis mutandis, and argues that the position is the same where a man bona fide believes that the work offered to him is fettered with conditions as to wages which will have the effect of ruining for the future not only his own chances but the chances of maintaining his family. In the same case Phillimore J. said (1): "I do not want to

(1) 68 J. P. 528.

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go into unnecessary details which might fetter the magistrate, but it would seem to me that to a person in the condition of a pauper in the charge of the parish, work affording any remuneration which would give that man shelter and food and the possibility of renewing his clothes when worn out, if not coupled with extraneous objectionable terms, would be work offered on reasonable terms. Any extraneous objection to the terms, such as undue length of tenure, rigorous conditions of conduct, or anything of that kind, might be very good ground on which the magistrate could find the terms offered were unreasonable." In this case it is common ground that there was no evidence as to the probable duration of the employment which in the end the respondent Nice declined to continue. Mr. Schiller, for the appellants, facing the matter frankly, said his argument would have been the same if the employment offered had been for one day only; in other words, that it is not open to the Court to say that what was done by, or what was feared from, the trade union would avail to protect Nice if he was offered work, subject to the condition to which he objected, for a single day.

Poplar Guardians v. *Martin* (1), after having been remitted to the magistrate, came again before the Divisional Court (2), and I refer to two passages in the judgments on the second hearing. Some discussion took place as to the limits within which what Phillimore J. termed "extraneous objections" must come, and on that Lord Alverstone C.J. said (3): "It being necessary to draw the line at some point, I think that the conditions imposed should be conditions which affect the man's work; and if the terms on which he is offered work are reasonable with reference to the work which he is called on to do, we ought to hesitate before holding that he was justified in refusing to do work offered him on such conditions. Instances of reasonable conditions are easy to suggest; for instance, to come to his work at certain hours, to obey orders relating to his work, to observe the hours for

(1) 68 J. P. 526. (2) [1905] 1 K. B. 728.
(3) [1905] 1 K. B. 732.

meals, to conduct himself properly during working hours and in connection with his work. But I doubt whether, in considering a question arising under s. 3, we have a right to say that the Court may regard conditions which are imposed on a man and made obligatory on him, but which have no relation to his work at all. For example, attendance on Sunday at some place of worship is a thing which is proper in itself and should be encouraged, and I can see no objection whatever to the respondent's attending the meetings of the particular organization which offered him the work; and similarly anything that would promote the cause of temperance is an admirable thing in itself and one which a judge would be the last person in the world to consider unreasonable; on the other hand, I doubt whether any of these matters ought to enter into our consideration when we are dealing with a criminal charge of refusing to work. However beneficial such conditions are in themselves, they have no relation to the man's work or to the question whether the man is willing to work, and without going so far as the learned magistrate, who seems, from the statement in the case, to have thought these conditions unreasonable, they are not in my opinion such as can properly be taken into consideration where a man is charged under this section with wilfully refusing to work." Ridley J. said (1): "It is difficult to suggest where the line is to be drawn unless we adopt the suggestion of my Lord, that the regulations or conditions must have some relation to the work offered him or to the wages which he is to receive for it or to his conduct in its performance." It is said in this case that what was objected to did not satisfy any of these tests; that the work itself was not open to objection; that it was suitable work and work which the respondent could do, yielding a wage upon which he was able to maintain himself and his family; and that the whole difficulty arose by reason of the unwarrantable interference of outside persons. That argument involves a subtle distinction which goes too far. The work was offered

(1) [1905] 1 K. B. 734.

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subject to the condition—and it was an essential condition—that the payment should be 2*l.* 6*s.* a week and no more, whereas, as is found in the case, the current rate for such work was 3*l.* 2*s.* 8*d.*; so that the work itself under the contract of service yielded a wage below the trade union rate. I should have thought that it was difficult to argue that that was a condition having no relation to the work offered and having no relation to the wages to be received. It is not necessary, in my opinion, nor is it desirable, to attempt to lay down any hard and fast rule as to the kind of conditions which the tribunal of fact may consider when faced with the question: did the man wilfully refuse or neglect to maintain himself and his family? It is enough to say that, having regard to the decision in *Poplar Guardians* v. *Martin* (1), and having regard to the facts of this case and interpreting the conclusion of quarter sessions by reference strictly to those particular facts, it is not possible for me to say that it was not open to quarter sessions to come to the conclusion they did. I think therefore that the appeal fails.

AVORY J. I agree in the result that this appeal must be dismissed. I come to that conclusion, however, with reluctance, because I fear that our decision may be quoted as an authority for the proposition that a man is justified under this statute in refusing to work at a wage which he is willing to accept, if, in his opinion, his doing so may interfere with his prospects for the future. Speaking for myself, I am not prepared to assent to that as a proposition of law. The reason why I agree that the appeal should be dismissed is because I think this Court cannot say that the acquittal of the respondent was improperly arrived at by quarter sessions. We have to bear in mind that the hearing was a rehearing, and that quarter sessions were as much at liberty to come to a decision upon the facts as the police magistrate was; and we have to bear in mind also that this being a criminal offence, quarter sessions were not only entitled

(1) 68 J. P. 526; [1905] 1 K. B. 728.

but justified in acquitting Nice of this offence, unless they were satisfied beyond all reasonable doubt that he had committed it. They had materials before them, looking at the judgments in *Poplar Guardians* v. *Martin* (1), upon which they might come to the conclusion that in the particular circumstances Nice was not, within the meaning of this statute, wilfully refusing or neglecting to maintain himself and his family. I wish to add this that, having regard to the judgments of the Court of Appeal in *Attorney-General* v. *Merthyr Tydfil Union* (2) the result of this case may be that guardians will have to consider whether they are entitled, in view of the judgments in that case, to afford relief to this man if he becomes again chargeable to the union. Guardians may be in a dilemma. According to *Attorney-General* v. *Merthyr Tydfil Union* (2) guardians may refuse relief in those circumstances; on the other hand, if the man is summoned for refusing to work, another Court may arrive at the same conclusion as the quarter sessions in this case, that he is justified in refusing it. It is unfortunate that some authoritative decision cannot be arrived at as to the legality of the action of the trade union in this case in preventing this man from earning his own living and supporting his family by work which he was willing to do.

GREER J. I agree that the appeal should be dismissed. I do so entirely upon the ground that we ought to follow, not only the actual decision in *Poplar Guardians* v. *Martin* (1), but also the grounds upon which it was founded. But for that case I should have had very grave doubt whether the order of quarter sessions should stand. Having regard to that case, it follows that the tribunal must always consider not merely whether the accused person refused to work, but whether there were grounds which it may think were reasonable to justify his refusal. If I had had to decide this case I am afraid I should have decided it as the police magistrate did, but I cannot say that there were

(1) 68 J. P. 526; [1905] 1 K. B. 728. (2) [1900] 1 Ch. 516.

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no facts before the quarter sessions enabling them to come to the conclusion that they did. I cannot say therefore that their decision was wrong in law.

Appeal dismissed.

Solicitor for appellants: *H. Cowper Scard.*

Solicitors for respondent: *Leonard Bingham & Sharp.*

J. S. H.

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THE KING *v.* RECORDER OF KINGSTON-UPON-HULL.

Ex parte GUARDIANS OF KINGSTON-UPON-HULL (*de* HART).

SAME *v.* SAME.

Ex parte SAME.

THE KING *v.* RECORDER OF KINGSTON-UPON-HULL.

Ex parte GUARDIANS OF KINGSTON-UPON-HULL (*de* MATCHAN).

SAME *v.* SAME.

Ex parte SAME.

Rating—Poor Rate—Proceedings—Appeal to Quarter Sessions—Jurisdiction—Conditions precedent—Notice of Appeal—Notice of objection to Valuation List—Local Act—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *ss.* 22, 45—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By a local Act of 1824, for the maintenance of the poor in a parochial area, an incorporation of the guardians was formed, and provision was made for the levying of rates, and for an appeal to quarter sessions against any rate on fourteen days' notice to the incorporation. By an order of the Local Government Board made in 1898 it was provided that the incorporation should be included in the Union Assessment Acts, 1862 to 1880, and thereupon under these Acts an Assessment Committee of the incorporation was appointed, and valuation lists were from time to time made for the parish and approved by the Assessment Committee. In April, 1922, a rate was made for the parish under the local Act of 1824, which in fact conformed to the valuation list then in force. A ratepayer having appealed to quarter sessions against the rate:—

Held, that (1.) it was a condition precedent to the jurisdiction of the Court of quarter sessions to entertain the appeal that the appellant should have given twenty-one days' notice of appeal to the Assessment Committee under s. 1 of the Union Assessment Committee Amendment Act, 1864, and that fourteen days' notice under the local Act was not sufficient; although (2.) it was not a condition precedent to that jurisdiction that the appellant should have given to the Assessment Committee notice of objection against the valuation list under the proviso to that section.

ORDERS NISI for certiorari and prohibition.

In Kingston-upon-Hull there is in force a local Act of 1824 (1), for the better maintenance, employment, and

(1) The Kingston-upon-Hull Maintenance, etc., of the Poor Act, 1824 (5 Geo. 4, c. xiii.), entitled "An Act for the better maintenance, employment, and regulation of the poor of the town of Kingston-upon-Hull, and for repairing or rebuilding the workhouse there," provides (s. 4) for the appointment of overseers of the wards of the town; (s. 7) for the appointment of guardians of the poor in the town; (s. 8) for the incorporation of the guardians by the name of "The governor, deputy governor, assistants, and guardians of the poor in the town of Kingston-upon-Hull," with a common seal; (s. 14) for the holding of general courts of the incorporation; (s. 36) for vesting the said corporation with all the powers of overseers, and empowering them to institute and defend any appeal against any rate or order relating to the purposes of the Act; (s. 39) that the corporation should set down and ascertain what sums would be needful quarterly or otherwise for the relief and maintenance and setting to work of the poor of the town, etc., and that the corporation should certify to the churchwardens and overseers the amount of such sums; (s. 41) that the churchwardens and overseers should meet and apportion the sums wanted amongst the wards; (s. 42) that the mayor and aldermen should issue warrants for the churchwardens and overseers to assess the apportionments on the wards; and should as soon as possible after the issuing of such warrants, assess the sum of money so apportioned upon each of the said wards by taxation of all such persons or property within the wards as were liable to be taxed and rated to the relief of the poor; (s. 43) that the rates on the wards were to be deemed one general rate; (s. 46) that in order the better to enable the churchwardens and overseers to apportion and assess the sums so to be raised and assessed, and to ascertain the annual value of all houses, lands, tenements and hereditaments within the town the said corporation should cause a survey and valuation to be made of all houses, lands, tenements and hereditaments within the town; (s. 50) that the guardians should have power to appoint assistant overseers to collect the poor rate; (s. 56) that rates when completed should be submitted to the mayor and aldermen for allowance; (s. 57) that if the mayor and aldermen neglected to issue warrants for collecting rates, the corporation might issue their warrants for that purpose; (s. 58) that if the churchwardens and overseers neglected to execute the powers

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regulation of the poor there, which appointed guardians of the poor; provided for their incorporation by the name of "The governor, deputy governor, assistants and guardians of the poor in . . . . Kingston-upon-Hull"; provided for the making, assessment, collection, and recovery of rates for the relief of the poor; and gave a right of appeal against any rate or assessment under the Act, on fourteen days' notice.

By the Kingston-upon-Hull Corporation Order, 1898, dated March 18, 1898, the area within the united parishes of Holy Trinity and St. Mary, of which Kingston-upon-Hull then consisted, was formed into one parish of Holy Trinity and St. Mary.

An order of the Local Government Board dated March 26, 1898, made under s. 45 of the Union Assessment Committee Act, 1862 (1), after reciting that section and s. 2 of the Union

of the Act, these might be executed by the said corporation; and (s. 106) that, where any person should think himself aggrieved by any rate or assessment made in pursuance of the Act, it should be lawful for him to appeal to the general or quarter sessions for the town and county next after the demand first made of any such rate or assessment, the appellant first giving "fourteen days' notice at the least in writing of his . . . . intention to bring such appeal and of the matter and ground thereof" to the said corporation and to such other person or persons as should be intended to be affected by such appeal.

(1) The Union Assessment Committee Act, 1862, provides:—Sect. 22: "In case any ratepayer shall under the existing law appeal to the special sessions or quarter sessions against any rate made for the relief of the poor in any parish, and the result of such appeal shall be to amend the rate appealed against, the Assessment Committee shall alter the valuation list of the said parish in conformity with the decision so made."

Sect. 45: "And whereas there are divers unions or incorporations for the relief of the poor formed under local Acts and under the Act of the twenty-second year of King George the Third, chapter eighty-three, which may desire to adopt the provisions of this Act: Be it enacted, that any such union or incorporation, on resolution to that effect of a majority, at two successive meetings of the body, having under the constitution of such union or incorporation the management of the relief of the poor within the same, may, by writing under the hand of the presiding chairman of the second of such meetings, apply to the Poor-Law Board to be included in this Act; and such union or incorporation, upon the consent of the Poor-Law Board being given to such application under its seal, shall be so included; and such consent so signified shall be evidence that such application was in all respects duly made according to the provisions above-mentioned; and such regulations shall thereafter be made from time to time by the said board,

Assessment Act, 1880, further recited and provided as follows: "Whereas at two successive meetings of the Board of Guardians, the second of which was held on January 26, 1898, resolutions were passed to the effect that the Board of Guardians were desirous that the provisions of the Union Assessment Acts, 1862 to 1880, should be in force in the said incorporation, and the Board of Guardians made application to us, the Local Government Board, by writing under the hand of the presiding chairman of the second of such meetings, that the incorporation should be included in those Acts; Now therefore we, having duly considered the said application do hereby consent thereto under our seal," and the order further provided that with the consent of the board of

with the consent of such body, as may be necessary to render the provisions of this Act conformable with the provisions of the Act under which the said union or incorporation shall have been formed."

The Union Assessment Committee Amendment Act, 1864, provides:— Sect. 1: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the Assessment Committee of such union: Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

The Union Assessment Act, 1880 (43 & 44 Vict. c. 7), provides:— Sect. 2: "Section forty-five of the Union Assessment Committee Act, 1862, shall apply to a parish which is not included in a union of parishes, and in which the relief of the poor is administered by a board of guardians elected under the Poor Law Amendment Act, 1834, or under any local Act, in like manner as near as may be as it applies to any union or incorporation for the relief of the poor formed under a local Act, and the Union Assessment Committee Act, 1862, and the Acts amending the same, shall be construed accordingly; and in relation to any such single parish the expression 'common fund,' in the said Acts shall be construed to mean the money applicable for the relief of the poor."

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guardians the Local Government Board thereby made a regulation that the first union assessment committee for Kingston-upon-Hull would be elected after notice in writing sent to every member of the board of guardians at the ordinary meeting of the board to be held on April 20, 1898.

On February 24, 1922, the clerk to the overseers of the said parish of Holy Trinity and St. Mary received from the clerk to the Assessment Committee of Kingston-upon-Hull Incorporation notice that a meeting of the Assessment Committee would be held on March 30, 1922, to hear objections to the valuation list then about to be made, and he thereupon caused notice of that meeting to be printed and published in accordance with s. 19 of the Act of 1862. On February 25, 1922, a valuation list was made and signed by the overseers, and on the same day the list was deposited and public notice of its deposit was given. On March 13, 1922, the clerk to the overseers sent the said valuation list to the clerk to the Assessment Committee, and it was received by the latter. In making, depositing and transmitting the said valuation list the overseers complied with ss. 14, 15 and 17 of the Act of 1862. On March 30, 1922, the intended meeting of the Assessment Committee was duly held to hear objections to the valuation list, which was approved by the Assessment Committee and signed by them in accordance with s. 20 of the Act of 1862, no objection to the said list being made by either of the occupiers mentioned below either before or after the approval thereof. The clerk to the Assessment Committee thereupon delivered the list so approved to the clerk to the overseers on behalf of the overseers in accordance with s. 23 of the Act of 1862, and s. 30 of the Poor Law Amendment Act, 1868.

On April 6, 1922, a general rate or assessment for the relief of the poor in the said parish of 2*s.* 2¼*d.* in the £, and a city rate of 2*s.* 9¾*d.* in the £, were made by the overseers and allowed and confirmed by the Lord Mayor and two Aldermen of the city and county of Kingston-upon-Hull; and notice thereof was given by the clerk to the overseers to the clerk to the Assessment Committee. On April 8, 1922, notice of

the allowance of the said rate was published on the doors of the churches in the parish. The said poor rate was in fact made by the overseers in conformity in all respects with the valuation list approved by the Assessment Committee as aforesaid, and in particular the hereditaments included in the rate were therein rated according to the annual rateable value thereof appearing in the valuation list.

At and before the time of the making of the above-mentioned valuation list and rates, one Eric Morgan Hart was the occupier of a shop and premises, No. 4 Whitefriargate in the said parish of Holy Trinity and St. Mary in the city and county of Kingston-upon-Hull; and one William Matchan was the occupier of a shop and premises No. 87, The Boulevard, in the said parish, city and county.

On July 14, 1922, notice of appeal by the above-named occupier, Hart, in regard to his said premises, addressed to the guardians, to the next general or quarter sessions for the city and county of Kingston-upon-Hull, against the said rate and assessment, was served upon the clerk to the guardians. The said notice was served more than fourteen days before the next quarter sessions, the date of which is mentioned below, and thus exceeded the notice of appeal mentioned in s. 106 of the local Act of 1824. (1) Notice of appeal by the above-named occupier Matchan in regard to his said premises to the said general or quarter sessions, which was over fourteen days in length, was also served on the clerk to the guardians.

Neither of the said appellants gave to the Assessment Committee the twenty-one days' notice of appeal mentioned in s. 1 of the Union Assessment Committee Amendment Act, 1864.

At the next successive quarter sessions held for the said city and county on July 31 and October 26, 1922, the said appeals were respited by consent.

At the quarter sessions held for the said city and county on January 26, 1923, the said appeals came on for hearing, when objection was taken on behalf of the respondents that

See note (1) ante, p. 631.

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the Court of quarter sessions had no jurisdiction to hear the appeals on the grounds that the appellants had not complied with the provisions of s. 1 of the Act of 1864, in that they had not given to the Assessment Committee twenty-one days' notice in writing, or any notice, of their intention to appeal, and in that they had not given to the Assessment Committee notice of objection against the valuation list and had failed to obtain such relief in the matter as they deemed just.

On January 26, 1923, the Court of quarter sessions reserved judgment.

On April 26, 1923, the recorder delivered judgment on the preliminary point of law as to jurisdiction in favour of the appellants. The recorder then adjourned the appeals to the next quarter sessions to be held in July, 1923.

In June, 1923, the guardians obtained orders nisi calling upon the justices of Kingston-upon-Hull to show cause why writs of certiorari should not issue to remove into the King's Bench Division the orders made by the justices at quarter sessions whereby it was ordered that the respective appeals of the said occupiers should be adjourned to the next July sessions, on the grounds that the Court of quarter sessions had no jurisdiction to hear and determine the said appeals (*a*) because the appellants had not given to the Assessment Committee notice of objection to the valuation list approved of by the Committee for the parish in conformity with which the said rate was made, and (*b*) because the appellants had not given to the Assessment Committee notice in writing of their intention to appeal to quarter sessions against the said rate. The guardians also obtained orders nisi calling upon the justices to show cause why writs of prohibition should not issue to prohibit them from proceeding in the said respective appeals in the said Court of quarter sessions, on the same grounds.

Mitchell Innes K.C. and *Sir Robert Aske* showed cause.

Konstam K.C. and *Vaughan E. G. Williams* in support of the orders nisi.

[The main arguments of counsel on both sides appear

from the judgments. The following cases were cited: *Reg.* v. *Middlesex Justices* (1); *Reg.* v. *Wiltshire Justices* (2); *Reg.* v. *Price, Ex parte Cole* (3); *Rhondda Valley Breweries Co.* v. *Pontypridd Union Assessment Committee* (4); *Shillito* v. *Hinchliffe.* (5)]

LORD HEWART C.J. The question in this case is whether the learned recorder of Kingston-upon-Hull had in the circumstances jurisdiction to hear and determine certain appeals to quarter sessions. It arises in the following way. There is for Kingston-upon-Hull a local Act of the year 1824, for the better maintenance, employment and regulation of the poor there. Under the provisions of that local Act an incorporated body named the Governor, Deputy Governor, Assistants and Guardians of the Poor in Kingston-upon-Hull was constituted and called upon to perform certain duties, and as a result of acts done by them rates are made for the relief of the poor of the locality, and persons are assessed thereto. By s. 106 of that Act provision is made for an appeal against any rate or assessment under the Act to the general or quarter sessions next after the demand of the rate or assessment is made, the appellant first giving fourteen days' notice at least of his intention to bring the appeal and of the matter and ground thereof.

That Act, however, does not stand alone. By an order dated March 18, 1898, the two parishes of which Kingston-upon-Hull consisted were amalgamated and thereupon formed a union consisting of one parish. By an order dated March 26, 1898, made by the Local Government Board in pursuance of s. 45 of the Union Assessment Committee Act, 1862, it was provided that the union should be included in the Union Assessment Acts, 1862 to 1880; and therefore from that time this union has been included in these Acts.

In April, 1922, a rate was made under the local Act of 1824 for the relief of the poor in Kingston-upon-Hull, and

(1) (1872) L. R. 7 Q. B. 653.
(2) (1879) 4 Q. B. D. 326.
(3) (1893) 62 L. J. (M. C.) 71.
(4) [1909] 1 K. B. 652.
(5) [1922] 2 K. B. 236.

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two of the persons assessed to that rate appealed against it to quarter sessions, giving the fourteen days' notice of appeal required by s. 106 of that local Act. When the appeals came on for hearing at quarter sessions two preliminary points arose—namely, first, whether it was necessary to the jurisdiction of that Court that the appellants should have given twenty-one days' notice of appeal under s. 1 of the Union Assessment Committee Amendment Act, 1864; and, secondly, whether it was necessary to the jurisdiction that the appellants should have given to the Assessment Committee notice of objection to the valuation list under the proviso to that section.

Before I deal with these points it is desirable to consider what was the effect of the inclusion of Kingston-upon-Hull in the Union Assessment Acts. Section 45 of the Act of 1862 is as follows: [His Lordship read that section and continued:] That section clearly suggests a distinction between inclusion in the Act and adoption of the provisions of the Act. A desire to adopt the provisions of the Act is a condition precedent to the application for inclusion; but after inclusion it is contemplated that regulations shall be made to render the provisions of the general Act conformable with the provisions of the local Act. It seems, at first sight at any rate, rather a curious way of stating these matters. One would rather have expected to find them put in the contrary order. So far, at any rate, as this particular case is concerned, it does not, however, appear that any regulation was made for the purpose contemplated by s. 45. The only regulation that was made was a regulation fixing the date of the coming into being of the first union assessment committee for Kingston-upon-Hull. The controversy which has arisen in the present case might possibly have been avoided if regulations such as are contemplated in s. 45 had in fact been made. However that may be, this union was undoubtedly included in the Act of 1862. In consequence of that inclusion there undoubtedly came into existence an Assessment Committee for the union, the object of the Act of 1862 being above all else to make effectual provision for securing uniform and correct valuation

of parishes in the unions of inclusion. That being so, is it possible to say that the union of Kingston-upon-Hull was not one to which the Act of 1862 applied ?

The argument which has been advanced by counsel showing cause against these orders nisi involves this proposition, that it is not correct to say that a statute applies to a person, unless it can be said that every part of the statute applies to that person: that the statute does not apply at all if any part of it does not apply. In what sense is it true in this case to say that the Act of 1862 does not apply to the union of Kingston-upon-Hull ? The answer appears to be: only in this sense, that the local Act of 1824 still remains in force and applies to Kingston-upon-Hull, offering, it may be, certain difficulties unless and until regulations such as were contemplated by s. 45 of the Act of 1862 are brought into being for the purpose of producing complete conformity. It is not, however, denied, on the contrary Mr. Mitchell Innes conceded in argument, that, except to the extent to which the provisions of the Act of 1862 are repugnant to the provisions of the Act of 1824, the Act of 1862 does apply and, since the events of March, 1898, has always applied to the union of Kingston-upon-Hull. In those circumstances it seems to me to be clear that since March, 1898, this union is one to which the Act of 1862 and the later Union Assessment Acts also have all along applied.

To return now to the first of the two points to which I referred, what is the notice which has to be given by a person seeking to appeal against assessment ? The answer is to be found in the early part of s. 1 of the Union Assessment Committee Amendment Act, 1864: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the Assessment Committee of such union." In this instance the notice given was not twenty-one days' notice, as required

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by that section, but was a shorter notice, and, therefore, that condition precedent to the jurisdiction of quarter sessions was not satisfied.

In a sense that conclusion is sufficient to dispose of the present case, but, as I have said, a second point was made and has been dealt with by the learned recorder, upon the proviso to s. 1 of the Union Assessment Committee Amendment Act, 1864. That proviso is in these terms: "Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." It has not been seriously urged that in this case the poor rate was by compulsion of law to be made in conformity with the valuation approved of by the Assessment Committee. The Assessment Committee for Kingston-upon-Hull was brought into being for certain purposes as a result of the inclusion of that incorporation in the Act of 1862; but the making of the rate continued in accordance with the provisions of the local Act of 1824, and it was not a matter of obligation, though no doubt it was a matter of convenience, that those who made the rate should in fact adopt or reproduce figures which accorded with those in the valuation list. Mr. Konstam, as I understand his ingenious argument, puts the matter in this way. He admits that it was not necessary that the rate in this union should be in conformity with the valuation list, but he says that as in the particular year the rate was in fact in conformity with the list, therefore the proviso to s. 1 applies, although in the opposite event it

would not have applied. In other words the argument is that conformity in fact, accidental or occasional conformity, of the rate to the valuation list is sufficient to bring into being the obligations of this proviso, although by the local Act, under which the rate is made, it is not necessary that the rate should be in conformity with the list. Is that the true conclusion?

For an answer I look at the rest of the proviso. The ratepayer who must make his objection to the Assessment Committee must also have failed to obtain relief from that Committee. That implies that the Assessment Committee can grant relief, but how could the Assessment Committee in this case grant relief? They had no control over the figures of the rate: they were not able to predict whether in a particular year the valuation list would be followed; and it is conceded that the valuation list need not be followed. In those circumstances a provision that the ratepayer should have failed to obtain relief at the hands of a certain body does not seem to me to be an appropriate provision in a case in which that body was not in a position to grant him relief. The concluding words of the section are to the effect that if the Assessment Committee have heard the objection and amended the valuation list accordingly, then they shall give notice of the amendment to the overseers, who shall thereupon alter their current rate accordingly. The argument of Mr. Konstam therefore involves this result, that although the rate need not be in conformity with the valuation list, nevertheless, if it happens to be in conformity with the list, the conditions of this proviso must be fulfilled, and the ratepayer must appeal to a Committee which has no control over the rate, and if the Committee decides in favour of the objection those who make the rate must follow the decision of the Committee. That seems to me to be a paradoxical result. However true it may be that for the past twenty-five years in Kingston-upon-Hull objections have been made to the Assessment Committee, and by agreement and consent between them and others no such difficulties as are indicated in this case have arisen, nevertheless the

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question is whether it is a condition precedent to the right of appeal to quarter sessions that the requirements of this proviso shall be fulfilled. I cannot think that it is enough to make the proviso applicable that the rate should merely happen to be in fact in conformity with the valuation list. In my opinion the whole scheme of this proviso indicates that the case which is being contemplated is a case where, by compulsion of law, the poor rate must be in conformity with the valuation list. Reference has been made to the cases of *Reg.* v. *Price* (1) and *Reg.* v. *Middlesex Justices* (2), but these cases, I think, do not throw much useful light upon the present case by reason of the difference of the respective circumstances.

Upon the whole, therefore, I arrive at the conclusion that the twenty-one days' notice ought to have been given under the first part of s. 1 of the Act of 1864, and that in default of that notice there is no jurisdiction in the Court of quarter sessions to hear the appeals; but, upon the second point, that this was not a case in which the conditions of the proviso to that section needed to be fulfilled. There is no doubt much to be said on the ground of convenience for the position which Mr. Konstam's clients took up, but it is not right, in my opinion, on grounds of convenience to put a strained construction upon the clear terms of the statute.

I think that upon the first ground the learned recorder had not jurisdiction to hear the appeals.

SANKEY J. I agree. It seems to me that upon these orders nisi two points fall to be determined—namely, first, whether s. 1 of the Union Assessment Committee Amendment Act, 1864, applies to the case; and secondly, if it does apply, what is the true construction of that section as applied to the facts of the case? As to the first question, in my view s. 1 of the Act of 1864 does apply to this case, because Kingston-upon-Hull is a parish contained in a union to which

(1) 62 L. J. (M. C.) 71. (2) L. R. 7 Q. B. 653.

the Union Assessment Committee Amendment Act, 1862, applies. I have reached that conclusion because of the Order of the Local Government Board dated March 26, 1898. That order, after reciting that at two successive meetings of the board of guardians of Kingston-upon-Hull, resolutions were passed to the effect that the board of guardians were desirous that the provisions of the Union Assessment Acts, 1862 to 1880, should be in force in the said incorporation—that is their area—and that the board of guardians had made application to the Local Government Board that the said incorporation should be included in those Acts, declares that the Local Government Board consent to the application and thereby make a regulation that the first Assessment Committee would be elected after notice in writing sent to every member of the board of guardians at the ordinary meeting of the board to be held on April 20, 1898.

Having come to the conclusion that s. 1 of the Act of 1864 does apply, I pass to the second question—namely: What is the true construction of that section as applied to the facts of the case under consideration? In my view it is as follows: That section requires in the first place that in every case in which there is an appeal under the section there is one condition precedent to the appeal which has to be performed by the appellant in order to give the sessions jurisdiction, that condition being that twenty-one days' notice in writing of the intention to appeal and the grounds thereof must be given to the Assessment Committee of the union. The object of that requirement appears to me to be to render workable the machinery provided for in s. 22 of the Union Assessment Committee Act, 1862. That section states: "In case any ratepayer shall under the existing law appeal to the special sessions or quarter sessions against any rate made for the relief of the poor in any parish, and the result of such appeal shall be to amend the rate appealed against, the Assessment Committee shall alter the valuation list of the said parish in conformity with the decision so made." I think that that section and the first part of s. 1 of the Act

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of 1864 are to be read together. In every case of appeal under the last-mentioned section twenty-one days' notice of appeal is to be given.

In one case of an appeal under s. 1 of the Act of 1864 other conditions precedent have to be complied with by the appellant in order that the sessions may have jurisdiction, and these conditions precedent are contained in the proviso to that section where it is stated that (inter alia) before the appellant can appeal to sessions he must have given to the Assessment Committee notice of objection against the valuation list and must have failed to obtain relief from the Assessment Committee itself. What is that one case in which those other conditions precedent to an appeal have to be complied with? That one case appears to me to be the case in which the rate has been made in conformity with the valuation list approved by the Committee. Was this a case in which the rate under consideration was made in conformity with the valuation list within the meaning of those words as used in s. 1? I think not. This is not a case to which the ordinary system of rating in pursuance of the public general Acts applies, according to which there must be a valuation list approved by the Assessment Committee followed by the rate made in the usual way. This is an exceptional case, in which there is in the area a separate loca authority charged with the duty of making the local rate. It is true that a valuation list has been made in the area, and that for the purpose of discharging its duty that local authority has been content to follow the valuation list which has been made. It appears to me however that it cannot be said that the local authority made the rate in conformity with the valuation list in question within the meaning of s. 1, where all that they have done has been to be content to follow the list which happened to be in existence. In my opinion, therefore, in a case such as the present the conditions precedent mentioned in the proviso do not apply, and it is not necessary for the appellant to perform these conditions precedent. I think however that all appellants have to perform the condition precedent in the first part of the

section, and, as that was not here complied with, I agree that the decision of the Court should be that which my Lord has indicated.

SALTER J. I am of the same opinion. The first question to be considered is what is the effect of the inclusion of Kingston-upon-Hull in the Union Assessment Committee Act, 1862. The inclusion was effected pursuant to an application made under s. 45 of that Act, as amended by s. 2 of the Union Assessment Act, 1880. I confess I do not know what is the meaning of the words at the end of s. 45 which refer to the making of regulations; but, whatever their meaning may be, I think that the effect of the inclusion of Kingston-upon-Hull in the Act of 1862 was to apply that Act to Kingston-upon-Hull as though Kingston-upon-Hull had been a union under the Poor Law Amendment Act, 1834, and that, I understand, is the footing upon which the case has been argued. The Act of 1862, which was passed to secure uniform and correct valuations, after establishing the Assessment Committee and the valuation list, provides that with certain exceptions the list shall govern the poor rate, and that without any exception the list shall regulate the contributions of the parishes to the common fund of the union. When the Act was passed some unions in the country comprised a parish or parishes in which the poor rate was made under a local Act. In such cases the powers of the local Act are carefully preserved so far as rating is concerned, but are put aside for the purposes of union finance: see ss. 24, 28, 29 and 43. In the parishes under the ordinary law the valuation list approved and delivered is the valuation list in force in the parish, but in parishes under the special Act the valuation list approved and delivered is not the list in force in that parish. Again, in parishes under the ordinary law the rate must be in conformity with the valuation list, but not in parishes where the rate is made under the authority of the local Act. On the other hand it is to be observed that by s. 30 the valuation list is to regulate the contributions of the parishes to the common

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fund, any statute to the contrary notwithstanding. Now, at the time when Kingston-upon-Hull applied for and obtained inclusion in the Act of 1862, Kingston-upon-Hull was a union consisting of a single parish, and in that parish the poor rate was made under the authority of the local Act. I think therefore that the effect of inclusion was that the valuation list became binding for all purposes of finance, but not binding in any way upon those whose duty it was to make the rate. On the contrary they remained bound under the local Act to exercise their own discretion.

That being so, it remains to consider s. 1 of the Act of 1864. I think that the latter part of that section, which makes it a condition precedent to appeal that application should be made to the Assessment Committee and that the applicant should have failed to obtain relief, applies only to cases where the rate must be in accordance with the list. In such a case as the present, where the rate is made under a local Act and need not be in accordance with the list, it appears to me that it would be impossible for the Assessment Committee to give relief, and the whole form of this part of the section appears to me to support that conclusion.

With regard to the earlier part of the section, which deals with the necessity for notice, I find myself constrained by the actual wording of the section. The words are: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which the appeal is to be made." Kingston-upon-Hull, it appears to me, is a union to which the Act of 1862 applies. Before the appeals in question could be heard by quarter sessions, it was therefore necessary that the notice prescribed by that section should have been given. Sect. 22 of the Act to which we have been referred shows that there are reasons why the Assessment Committee should be entitled to that notice. I think, therefore, that the learned recorder was wrong in holding that he had jurisdiction to hear the appeal in the

absence of notice of appeal under s. 1 of the Act of 1864; but that he was right upon the other point arising upon the proviso to that section.

Orders nisi absolute.

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Solicitor for the recorder of Kingston-upon-Hull: *Benno Pearlman, Hull.*

Solicitors for the guardians of Kingston-upon-Hull: *Bell, Brodrick & Gray, for Winter & Son, Hull.*

J. R.

T. AND J. BROCKLEBANK, LIMITED *v.* THE KING.

1923 *Dec.* 17.

1924 *Jan.* 14.

Emergency Legislation—Defence of the Realm—Shipping Control—Licence to sell British Ship to Foreign Firm—Condition—Payment of Part of Price to Ministry—Legality—Recovery of Money paid—British Ships (Transfer Restriction) Act, 1915 (5 *Geo.* 5, *c.* 21), *s.* 1—*Indemnity Act*, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*b*).

The Defence of the Realm Acts and Regulations did not empower the Shipping Controller to require, as a condition of a licence to sell a British ship to a foreign firm, that a percentage of the purchase money should be paid to the Ministry of Shipping.

Where, therefore, such a condition had been imposed by the Shipping Controller and the proportion of the purchase money had been paid by the vendors to the Ministry:—

Held, that the imposition of the condition was illegal, and that the payment was not a voluntary payment.

Attorney-General v. *Wilts United Dairies, Ld.* ([1921] W. N. 252; [1922] W. N. 217; 37 Times L. R. 884, 38 ibid. 781) applied.

Held, further, that the case did not fall within s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, as being a claim for compensation for loss incurred or sustained, but was a claim of right under a contract within the meaning of s. 1, sub-s. 1 (*b*), and that the suppliants (the vendors) were entitled to recover back the amount by petition of right.

PETITION OF RIGHT tried before Avory J.

The following statement of facts is in substance taken from the judgment of the learned judge:—

In this case the suppliants claim to recover the sum of 34,920*l.*, as money received to their use, which sum had been paid by them to the Accountant-General of the Ministry of

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Shipping on February 20, 1920, under the following circumstances. In November and December, 1919, the suppliants were desirous of selling one of their steamships, the *Marwarri*, to a foreign purchaser. At that date such a transfer could not lawfully be carried out without the licence of the Shipping Controller: see stat. 5 Geo. 5, c. 21, s. 1, and 6 & 7 Geo. 5, c. 42, s. 3, sub-s. 2, and 6 & 7 Geo. 5, c. 68.

Upon application being made by the suppliants for such licence the Shipping Controller declined to grant the same except upon the condition, among others, that 15 per cent. of the purchase price should be paid by the suppliants to the Ministry of Shipping. On January 6, 1920, notwithstanding objection raised by the suppliants and their demand to know by what authority this condition was imposed, it was finally insisted upon. The suppliants then agreed to pay the 15 per cent., and on January 27, 1920, the Shipping Controller gave his consent to the sale of the said steamship to an Italian firm for the sum of 240,000*l.* Upon receipt of the purchase money the suppliants paid the said sum of 34,920*l.* as directed to the Accountant-General of the Ministry of Shipping.

The suppliants prayed (1.) A declaration that the Shipping Controller was not entitled to demand payment of any sum as a condition of granting permission for the sale to a foreign owner of a British ship. (2.) Repayment to them of the sum of 34,920*l.*

Sir John Simon K.C. and *A. Hildesley* for the suppliants. The Shipping Controller had no authority, statutory or otherwise, to exact a payment as a condition of granting a licence to transfer a British ship. No doubt he had authority to refuse to grant a licence to sell a British ship to a foreigner, but that did not justify the exaction of a payment as a condition for granting the licence. In *Attorney-General* v. *Wilts United Dairies, Ld.* (1), where the Food Controller had imposed as a condition of the grant of a licence to purchase

(1) [1921] W. N. 252; [1922] W. N. 217; 37 Times L. R. 884; 38 Ibid. 781.

milk in certain areas a charge of 2*d.* per gallon to be paid to him by the purchaser, it was held that such charge was ultra vires. There is no distinction in principle between that case and the present. In the Court of Appeal Atkin L.J. said that if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown, "he must show in clear terms that Parliament has authorised the particular charge." This payment was not a voluntary payment by the suppliants, but was in fact made under what amounted to compulsion: *Maskell* v. *Horner.* (1) The present case falls within the proviso to s. 1 of the Indemnity Act, 1920. It is a claim of a right under a contract—namely, the failure to return the money. In *Marshal Shipping Co.* v. *Board of Trade* (2) the question was left open whether where a Government official wrongfully extorts from a subject a sum of money for the use of the Crown, the injured party can waive the tort, and sue the official personally as for money had and received. But, however that may be, the present suppliants are entitled to recover the amount claimed by petition of right.

Sir Douglas Hogg A.-G. and *Russell Davies* for the Crown. The so-called exaction of this payment was legal. The prohibition with regard to transfer of British ships was not by the Shipping Controller, but by Parliament, which had provided by s. 1 of the British Ships (Transfer Restriction) Act, 1915, that a transfer of a British ship to a person not qualified to own a British ship should not have any effect, unless the transfer was approved by the Board of Trade. Reg. 39 (c.) (c.) of the Defence of the Realm Regulations went even further, and provided that a transfer should not be made without the permission in writing of the Shipping Controller. As British shipping was subject to certain restrictions, a foreigner could pay a higher price than a British purchaser, and all that the Shipping Controller did was to lay it down that, if advantage was taken of that circumstance, the excess should go to the State. In *Attorney-*

(1) [1915] 3 K. B. 106. (2) [1923] 2 K. B. 343.

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General v. *Wilts United Dairies, Ld.* (1) it was not Parliament, but the Food Controller who, without authority, imposed the condition as to licences to purchase milk. That case is, therefore, distinguishable from the present. But even if the demand of payment was illegal, the suppliants cannot recover the money. They were not bound to go on with the sale, yet they went on with it, and it proved very profitable to them. They sent the money to the Accountant-General with full knowledge of the facts, and cannot now recover it back. The Controller was under no obligation to grant a licence. It was in his discretion: *William Whiteley, Ld.* v. *The King.* (2)

Further, assuming the money to be recoverable, it would not be from the Crown, but from the Board of Trade, as representing the Controller: *Marshal Shipping Co.* v. *Board of Trade.* (3) If the suppliants have any claim it must be against the person who, they allege, illegally exacted the money. In imposing this condition the Shipping Controller purported to be acting "in the execution of his duty" within the meaning of s. 1, sub-s. 1, of the Indemnity Act, 1920, and if so, no legal proceeding can be brought unless the case comes within the proviso. Para. (*b*) of the proviso does not apply. The Legislature there meant an actual contract, and not, as contended, a claim as for money had and received to the plaintiff's use. The suppliants cannot maintain a petition of right. If they have any claim it is for compensation for loss incurred under the provisions of s. 2.

Sir John Simon K.C. in reply. The suppliants' cause of action is the omission to return the money: *Umphelby* v. *M'Lean.* (4) When the parties are not on equal terms there arises the situation of duress. In *Morgan* v. *Palmer* (5) Abbott C.J. said: "If one party has the power of saying to the other, 'that which you require shall not be done

(1) [1921] W. N. 252; [1922] W. N. 217; 37 Times L. R. 884; 38 Ibid. 781.
(2) (1909) 101 L. T. 741.
(3) [1923] 2 K. B. 343.
(4) (1817) 1 B. & Al. 42.
(5) (1824) 2 B. & C. 729, 735.

except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." Payment of the amount demanded was the only way of getting what the suppliants required.

Cur. adv. vult.

1924. Jan. 14. Avory J. read the following judgment.

[After stating the facts the learned judge continued]: On behalf of the suppliants it is contended that the said sum was paid in discharge of a demand illegally made under colour of his office by the Shipping Controller, and the first question is whether there was any statutory or other authority for the imposition of this condition to the granting of the licence. On this point the Attorney-General referred to reg. 39 (c) (c) of the Defence of the Realm Regulations, which applies only to purchasers of vessels, and the conditions there referred to include, in my opinion, only such as could lawfully be imposed. In view of the decision of the Court of Appeal in *Attorney-General* v. *Wilts United Dairies, Ld.* (1) I come to the conclusion that the imposition of the condition in the present case was ultra vires the Shipping Controller and was a levying of money for the use of the Crown without grant of Parliament within the meaning of the Bill of Rights. The Attorney-General stated that the 15 per cent. had been calculated on the basis of this being the extra price obtainable from a foreign purchaser on the sale of a British ship, but, however it was calculated; and although I do not doubt that the condition was imposed in perfect good faith and in the honest belief that it was in furtherance of the object of the British Ships (Transfer Restriction) Act, 1915, I think the payment was exacted without authority and was therefore illegally exacted. The next question is whether the suppliants are entitled to recover this money so paid and whether from the Crown by this petition of right or whether, as the Attorney-General suggested, the Board of Trade is

(1) [1921] W. N. 252; [1922] W. N. 217; 37 Times L. R. 884; 38 Times L. R. 781.

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in any event the party to be sued. With regard to the liability of the Board of Trade, the Court of Appeal in *Marshal Shipping Co.* v. *Board of Trade* (1), in which the cause of action is based on facts like those of the present case, have left open the question whether the Board of Trade is liable to be sued, but it appears from the judgments that if the alleged tort is waived and the proceeds of that tort have been accounted for to the Government, the recovery of the money would properly be made the subject of a petition of right to the Crown.

I have now to consider whether the money in this case was paid under compulsion within the meaning of the authorities or whether it was a voluntary payment as contended on behalf of the Crown. The case of *Maskell* v. *Horner* (2), which was relied on by the suppliants, does not, in my opinion, govern this case. In giving judgment Lord Reading C.J., said: "If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. . . . . The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand." That passage must be read in connection with the facts of that case, which was decided on the ground that the tolls had been paid under threat of seizure of the plaintiffs' goods and to avert that

(1) [1923] 2 K. B. 343. (2) [1915] 3 K. B. 106, 118.

threatened evil, and the judgments had no reference to the case of money extorted by a person colore officii.

On behalf of the Crown it was contended that the payment in this case was not made under protest, and the judgment of Walton J. in *William Whiteley, Ld.* v. *The King* (1) was relied on; but an express protest is not necessary if the compulsion is apparent from the circumstances of the case: *Maskell* v. *Horner*. The learned judge in *Whiteley's Case* (1), while holding that money paid to the Commissioners of Inland Revenue under threat that, if not paid proceedings would be taken for penalties, was not recoverable as money paid under compulsion, was careful to distinguish the case of money extorted by a person for doing what he is legally bound to do without payment, and upon this point the case of *Morgan* v. *Palmer* (2) is a direct authority. It may be said that the Shipping Controller was not legally bound to grant a licence, but in granting or refusing it, he was bound, I think, to exercise a judicial discretion and not to impose a condition of payment which was unlawful: *Rex* v. *Athay* (3) and *Parker* v. *Great Western Ry. Co.* (4) The money in the present case was not paid under any mistake of fact, nor was it, in my opinion, paid under any mistake of law, but adapting the words of Littledale J. in *Morgan* v. *Palmer* (5), the suppliants were merely passive and submitted to pay the sum claimed as they could not otherwise procure the licence, and subject to the further point taken by the Attorney-General under the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48), I think the suppliants would be entitled to recover the sum claimed as money received to their use. The Attorney-General contended that even if the action of the Shipping Controller could not be justified, he nevertheless purported to be acting in the execution of his duty, and under those circumstances compensation would be payable under s. 2, sub-s. 1 (*b*), of the Indemnity Act, and no action or other legal proceeding would lie in respect thereof; but I

(1) 101 L. T. 741.
(2) 2 B. & C. 729.
(3) (1758) 2 Burr. 653.
(4) (1844) 7 Man. & G. 253, 292, 293.
(5) 2 B. & C. 729, 739.

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doubt whether the suppliants can be said to have "incurred or sustained any direct loss or damage" within the meaning of that section, particularly having regard to the terms of Part II. of the Schedule to that Act and to the suppliants' admission that the ship was not saleable to any British purchaser, to their own description of the ship in their letter of December 4, 1919, and to the fact that they possibly added on the 15 per cent. to the selling price, although there is no evidence as to this, and therefore, I think this is not a case where a claim for compensation can be brought under s. 2 of the Act, but is within the proviso to s. 1, a claim in respect of a right under an alleged breach of a contract, the cause of action being the non-return of the money: *Umphelby* v. *M'Lean.* (1)

In the result, although no claim was made by the suppliants for the return of the money until after the decision in *Attorney-General* v. *Wilts United Dairies, Ld.*, in the House of Lords (2), I come to the conclusion with some hesitation upon the authority of that case and of *Morgan* v. *Palmer* (3) that they are entitled to the declaration prayed for.

Judgment for the suppliants.

Solicitors for suppliants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitor for Crown: *Solicitor to Board of Trade.*

(1) 1 B. & Al. 42.

(2) [1922] W. N. 217; 38 Times L. R. 781.

(3) 2 B. & C. 729.

F. C.

[IN THE COURT OF APPEAL.]

C. A.
1924
Jan. 11.

SMITH *v.* GRIGG, LIMITED.

[1923. S. 4914.]

Practice—Infringement of registered Design—Interlocutory Injunction.

In an action for infringement of a registered design the Court will, as a general rule, refuse to grant an interlocutory injunction if the registration is of recent date and its validity is genuinely disputed.

APPEAL of the defendants from an order of Roche J. at chambers.

The plaintiff was the registered proprietor of a design registered under the Patents and Designs Acts, 1907 and 1919, in Class 3 as of March 16, 1923, for application to roll top desks. The principal feature of the design was that upon the roll top of the desk being raised the flaps or sides of the top fell into a horizontal position, thereby increasing the writing surface of the table. According to the affidavit of the plaintiff he in October, 1922, showed to the defendants in confidence a sketch of the design and invited them to manufacture a sample roll top desk in accordance with the design, with a view to his giving them a large order for such desks if the sample proved satisfactory. He subsequently found that the defendants were selling and advertising for sale on their own account desks embodying his design. On November 5, 1923, he commenced an action claiming (inter alia) damages for infringement of the design, and praying an injunction. On November 8 he took out a summons for an injunction restraining the defendants from applying the design to any desks or from selling or advertising for sale any desks which were imitations of the said design until after the trial of the action. Roche J. made the order asked for.

The defendants appealed to the Court of Appeal.

Trevor Watson for the appellants. In the case of a design recently registered, where there is a genuine dispute as to the validity of the design, an interlocutory injunction ought not to

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be granted. Actions for infringement of designs are comparatively rare, and there is apparently no case in which the question whether an interlocutory injunction may be granted in such an action has ever arisen. But in patent actions it has been the settled practice since 1884 not to grant such an injunction where the patent is recent. In *Lister* v. *Norton & Co.* (1), in an action for infringement of a patent three years old, where the defendants disputed the validity of the patent and showed a case to be tried, a motion for an interlocutory injunction was dismissed on the defendants undertaking to keep an account of the profits made by the sale of the articles of which the plaintiff complained. The same rule was applied by the Court of Appeal in *Jackson* v. *Needle.* (2) There the patent was only a few months old at the time of action brought, and Bacon V.-C. having granted an interlocutory injunction on the plaintiff undertaking to be answerable in any damages which the Court might direct, the Court of Appeal discharged the order, the defendant undertaking to keep an account of his sales. In *Trautner* v. *Patmore* (3), where the patent was one year old, Parker J. said: "I cannot grant an interim injunction. It is very unusual if the patent has not been established." There is no reason why the rule so applied to patent actions should not equally be applied to actions for infringements of designs. There are in the present case two substantial defences to the action. In the first place the defendants say that the design is not novel, for they had in their possession before they ever had any communication with the plaintiff a desk which was constructed according to a similar design with folding flaps at the side and a roll top. And secondly, the design was not a registerable design, by reason of the definition of "design" in s. 19 of the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), which excludes a "mode or principle of construction." (4)

(1) (1884) 1 R. P. C. 114.
(2) (1884) 1 R. P. C. 174.
(3) (1911) 29 R. P. C. 60, 63.
(4) By s. 19 of the Patents and Designs Act, 1919, "'Design' means only the feature of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate

R. F. Levy for the respondent. The rule applicable to patents ought not to be applied to designs. The two things do not stand on the same footing. An infringement of a design is not regarded in the same light as an infringement of a patent. By s. 53 of the Act of 1907 the registered proprietor is to have copyright in the design for five years from the date of registration. By s. 60, sub-s. 1, during the existence of the copyright it is unlawful for any person, (*b*) knowing that the design has been applied to an article without the consent of the registered proprietor, to publish or expose that article for sale. While the design is on the register there is an absolute prohibition against infringement, and it is in general no defence to say that the registration is invalid and that the design ought not to be on the register. There is only one exception to that general rule, which is that provided by s. 58. That section, after providing in sub-s. 1 that any one may apply for the cancellation of the registration of a design on the ground that the design is used for manufacture exclusively or mainly outside the United Kingdom, in sub-s. 2 says that: "Such ground as aforesaid shall be available by way of a defence to an action for infringement of the copyright in the design." In all other cases the invalidity of the registration can only be used in support of an application to expunge. The defendant here has as yet made no such application. The result is that so long as the design is on the register the defendant cannot set up what in the patent cases was treated as one of the conditions of refusing an interlocutory injunction—namely, that there is a substantial defence to be tried on the ground of the invalidity of the patent.

SCRUTTON L.J. In this case the plaintiff brings an action against Grigg, Ld., claiming, amongst other things, an injunction to restrain them from infringing his registered design, and damages for its infringement. Having issued

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or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device."

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his writ he took out a summons for an interlocutory injunction to restrain the infringement till after the hearing of the action. From the authorities which have been cited to us, and from my own personal inquiries from sources competent to give me information on the matter, it appears that there is in patent cases a well recognized rule of practice in the Courts which have to deal with patent cases with respect to interlocutory injunctions, and it is this: That where the patent which it is sought to protect is a recent patent an interlocutory injunction will not be granted if there is a genuine issue to be tried. In *Trautner* v. *Patmore* (1) Parker J. stated the rule very shortly: "I cannot grant an interim injunction. It is very unusual if the patent has not been established." It is stated at greater length by this Court in *Jackson* v. *Needle* (2), a case which was decided shortly after the passing of the Patents, Designs and Trade Marks Act, 1883, when both Baggallay and Cotton L.JJ. said that the Court abstains from interfering by interlocutory injunction in the case of a recently dated patent where there is a substantial question to be tried. I take it that the principle underlying that rule is this: The Court leans against monopolies; where you find an old established monopoly, which has been in existence for years without being challenged, there is no reason for the Court to lean too hardly against it; but where you find a claim to a monopoly which is of recent origin, and which there has not been time to challenge, the Court is inclined to take the view that, in the absence of special circumstances, the monopoly must be established by a judicial decision before it can interfere by way of interlocutory injunction. It is not a universal rule; there may be facts which will lead the Court in a particular case to depart from it, but as a general rule that is the practice of the Court. So far as I know there is no case which expressly states that the rule so applied to monopolies in patents is also applicable to monopolies in designs, but when once one sees the reason on which the rule as to patents is based it appears equally to apply to the comparatively less

(1) 29 R. P. C. 60, 63. (2) 1 R. P. C. 174.

important monopoly in designs. In the present case the design was of quite recent origin; it was registered in March, 1923. It is a design for the manufacture in wood of a roll top desk. Roll top desks were known long before March, 1923. This roll top desk has hinged flaps on each side. Such hinged flaps were known long before March, 1923. It is consequently obvious that there may be a serious question whether the design is original. I am not deciding that question, for I have not the materials on which to do it. All I can say is that there may be a substantial question to be tried. There is obviously a further question, whether what the plaintiff is seeking to protect is a design which is capable of being registered under the Act, or whether it is not a "mode or principle of construction." Mr. Levy has argued that under the special provisions of the Patents and Designs Acts designs do not stand on precisely the same footing as patents, and that when once you have a design on the register its validity cannot be disputed so long as it remains there; that is to say, that until it is expunged there is no question to be tried. No doubt that raises a serious question, which will have to be considered on the wording of these Acts, but I do not think that it is sufficient to justify us in departing from the general rule as to interlocutory injunctions in actions for infringement of a monopoly. As the design is recent and there is a substantial doubt as to its validity the order granting an interlocutory injunction ought to be set aside.

ATKIN L.J. I agree. A plaintiff who applies for an interlocutory injunction to restrain further infringements of an alleged right must establish to the satisfaction of the Court a strong prima facie case that the right which he seeks to protect in fact exists. The reason why the Courts have as a general rule refused interlocutory injunctions for the protection of patents of recent origin is that the plaintiff is unable to make out that strong prima facie case. According to our patent law, which in this respect differs from that of some other countries, the mere fact that a patent has been granted is not sufficient proof that the grantee is entitled to the

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monopoly which he claims. Where indeed the patent is an old one and has not been disputed different considerations apply. But where the patent has been recently granted the grant is not enough to justify the Court in interfering by way of injunction until after the trial of the action. I think that the same rule must apply to a claim for the protection of a registered design. Mr. Levy has argued that the effect of the provisions of s. 53 of the Patents and Designs Act, 1907, is to give to a person who has got himself registered as the proprietor of a design an absolute statutory right until the registration has been set aside. I do not wish to determine that question, because it is plain that it is open to a person who complains of the registration to take steps for the rectification of the register, and if he satisfies the Court that he is about to take such steps, then I think that on an application for an interlocutory injunction the Court is entitled to consider what the probability is of the plaintiff being able to establish his title to the design. I think that here it is at least open to doubt whether the plaintiff will be able to show that his design was new and original, and further whether what the plaintiff has put upon the register is a "design" at all, as distinguished from a "mere mechanical device." In these circumstances I think that the injunction ordered must be discharged, on the terms that the defendants undertake to keep an account of the articles which they sell until the trial of the action.

Appeal allowed.

Solicitors for the appellants: *Lewis & Payne.*
Solicitor for the respondent: *Herbert Z. Deane.*

J. F. C.

[IN THE COURT OF APPEAL.]

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BLACK *v.* ADMIRALTY COMMISSIONERS.

Emergency Legislation—Contract—Interference with, by Government—Claim for Compensation—"Direct and particular interference with business"—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-s.* 1 (*b*), *Schedule, Part II.*

The claimant, whose business was that of a steam-trawler owner, had a contract with a firm of trawler builders to build for him a number of trawlers. Before the builders had commenced to build the trawlers so contracted for the Admiralty issued an Order to them under reg. 8A of the Defence of the Realm Regulations, directing them not to proceed with any work on vessels for private owners, but to work for the Admiralty instead. At the time of making that Order the Admiralty had full knowledge of the existence of the claimant's contract with the builders. By reason of the Order he suffered substantial loss. On a claim being made for compensation under the Indemnity Act, 1920, s. 2, sub-s. 1 (*b*) and Schedule, Part II. :—

Held, that the Admiralty's knowledge of the contract was wholly immaterial, and that in so far as the Order interfered with the claimant's business it was only a secondary and indirect interference, with the result that the claimant was not entitled to compensation.

APPEAL from the War Compensation Court.

The claimant, Sir Alec Black, carried on the business of a steam-trawler owner at Grimsby. The claimant to the knowledge of the Board of Admiralty in May, 1916, entered into a contract with Messrs. Cook, Welton & Gemmell for the construction on his behalf of eight steam-trawlers intended to be used by him in his business. The trawlers were to be constructed according to plans approved by the Admiralty and were suitable in case of requirement for the purpose of being hired by the Admiralty for naval purposes. On October 29, 1916, before the builders had commenced to build any of the trawlers so contracted for, the Admiralty issued an Order to the builders under reg. 8A of the Defence of the Realm Regulations to cease proceeding further with work on any vessels which they might be building for private owners and to work for the Admiralty instead. The claimant subsequently preferred a claim before the War Compensation Court under the Indemnity

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Act, 1920 (1), claiming compensation for the loss which he had sustained as a result of that order. The trawlers were by the terms of the contract to be delivered on certain specified dates in 1917 and 1918, and the difference between the contract prices and the prices which the claimant would have to pay in the market on those dates for similar vessels was admitted to be a sum of 39,794*l.* The claimant claimed to recover that sum. Alternatively he claimed to recover the difference between the contract prices and the prices which he would have had to pay for them if, not being purchasable in the market, they had been contracted for in the latter half of the year 1919, that being the earliest date at which contracts for their building could have been placed after the cessation of hostilities, which difference was represented by the sum of 66,794*l.* He further claimed the loss of the profits that he would have made by hiring the vessels to the Admiralty. The claim was made under s. 2, sub-s. 1 (*b*), and Part II. of the Schedule, "for direct loss . . . . suffered by the claimant by reason of direct and particular interference with his . . . . business." The Compensation Court were of opinion that because the interference with the contract was made with knowledge of the contract's existence it became a direct and particular interference within the meaning of Part II. of the Schedule. They found that the claimant was entitled to compensation in an amount which

(1) By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, any person who has otherwise than by requisition of a ship "sustained any direct loss or damage by reason of interference with his . . . . business . . . . through the exercise . . . . during the war of any power under any enactment relating to the defence of the realm . . . . shall be entitled to payment or compensation in respect of such loss or damage."

By sub-s. 2 (iii.) (*b*), if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the Schedule to the Act.

By Part II. of the Schedule: "The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war."

was reserved for further discussion, but they held that in any event it could not exceed the sum of 39,794*l.* above mentioned.

The Admiralty Commissioners appealed.

Sir Thomas Inskip S.-G. and *Ricketts* for the appellants. The claimant is not entitled to any compensation at all; the case does not come within the Act. The Order which caused the loss was not a direct and particular interference with the claimant's business. It may have been such an interference with the builders' business but not with that of the claimant. This was the view taken by Lord Cave L.C., in whose judgment Lord Sumner concurred, in *Moss Steamship Co.* v. *Board of Trade.* (1) There a shipping company, whose ordinary business it was to run a line of steamers to the Mediterranean, chartered a ship for the purpose of being employed on that business. By the charterparty it was provided by cl. 32 that if during the currency of the charter the ship was directed by the Government for some voyage the direction was to be for the charterers' account. During the currency of the charter the Government directed the owners to send the ship on a voyage to Cuba. The Court of Appeal held that the charterers were not entitled to compensation. The majority of the House of Lords (Lords Cave, Haldane and Sumner) agreed in dismissing the appeal, but differed in their reasons, Lords Cave and Sumner going upon the ground that the direction was not a direct and particular interference with the charterers' business, the interference was only "a secondary and indirect result of the direction." Lord Haldane however declined to decide that point, preferring to rest his judgment upon the ground taken by the majority of the Court of Appeal, that the charterers by agreeing to the insertion in the charterparty of cl. 32 in the anticipation of a possible Government direction made the prosecution of the directed voyage a part of their business, so that the direction was not an interference with their business at all, and the question whether it was direct and particular did not arise. Lords Finlay and Parmoor dissented. The

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Court is invited to follow the decision of Lord Cave. The Compensation Court in the present case thought that the Admiralty's knowledge of the existence of the claimant's contract with the builders at the time of the Order given to the latter was material to this question. They thought that an analogy was afforded by *Lumley* v. *Gye* (1), which established that the prevention of a third person from carrying out his contract with the plaintiff with knowledge of the existence of that contract is a direct interference with the plaintiff's rights under the contract. They also were of opinion that, notwithstanding that the Admiralty's Order was a prohibition against working for private owners generally, the knowledge of the contract made the interference particular. It is contended however that it is not material to consider the Admiralty's knowledge of the existence of the contracts interfered with. *Lumley* v. *Gye* (1) has no bearing on this case. It decided that knowingly to interfere with contractual rights was cause of action in the absence of just cause or excuse, and in the present case the Admiralty had just cause for interfering under the provisions of the Defence of the Realm Regulations. The claimant's business consisted in the use of trawlers for the purpose of fishing, and the Admiralty Order did not interfere with that business, because he could not carry it on at all owing " to the existence of a state of war."

In the Court below the further point was taken on behalf of the Crown, that the Order of the Admiralty was an " Order . . . . of general . . . . application," by reason of a similar letter prohibiting building for private owners having been sent to eight other steam-trawler builders who were, so far as the Admiralty knew at that time, the only builders capable of turning out ships of a particular quality. But that point is not relied upon for the Crown here.

Compston K.C. and *Eales* for the respondent. The decision of the Court below was right. An order to the builders not to carry out their contract with Black, made with knowledge of the existence of that contract, cannot be regarded

(1) (1853) 2 E. & B. 216.

otherwise than as an interference with Black's business. The distinction between this case and *Moss Steamship Co.* v. *Board of Trade* (1) is that there the Board of Trade had no knowledge of the terms of the claimants' charterparty at the date of the Order. The fact of that knowledge is most material. The Compensation Court were right in relying on the analogy of *Lumley* v. *Gye*. (2) That case involves that an interference with contractual rights knowingly made is sufficiently direct to be a cause of action. The fact that the defendant had just cause for the interference no doubt takes away its actionability, but even in those circumstances *Lumley* v. *Gye* (2) holds good as an authority that the loss is the direct result of the interference.

Sir Thomas Inskip S.-G. replied.

Cur. adv. vult.

Jan. 25. BANKES L.J. This is an appeal from the War Compensation Court, and the question of law raised by the appeal is whether there is any evidence that the claimant has suffered a loss for which the Indemnity Act, 1920, provides compensation.

The decision of the War Compensation Court was given in March, 1923, and I think it convenient, having regard to the argument addressed to that Court, to call attention to the state of the authorities at that date. There had been two cases before this Court in which somewhat similar questions had arisen. The first was *Elliott Steam Tug Co.* v. *Shipping Controller*. (3) I have before had occasion to point out that that decision has been much misunderstood. The majority of the Court there thought that there was evidence of a direct loss under s. 2, sub-s. 1 (*b*), but, as that would not have been enough to establish a claim to compensation if its allowance would have been in contravention of Part II. of the Schedule, and as it was not clear at what conclusion the Compensation Court had arrived on that point, we sent the case back for a further report, with the result that that

(1) [1924] A. C. 133. (2) 2 E. & B. 216.
(3) [1922] 1 K. B. 127.

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Court reported that the loss sustained was "due solely to the existence of a state of war." This Court consequently held that the claim to compensation failed; but it gave no decision upon the question whether the loss there was the result of a "direct and particular interference with the claimant's business" within the meaning of Part II. of the Schedule. The next case was *Moss Steamship Co.* v. *Board of Trade.* (1) There the claimant was the charterer of a vessel on time charter, and was in a position to earn considerable profits by the employment of the vessel whilst she was under charter, but an Order was made by the Shipping Controller, under reg. 39 B B B, directed not to the charterer but to the owners of the vessel, that they were not to allow her to go upon the voyage on which she would have gone under her charter, but were to send her on another specified voyage. It was under those circumstances that the charterer claimed compensation under the statute. When the case came before this Court all the members of the Court agreed in thinking that the claimant had failed to establish a case for compensation, but they were not agreed upon their reasons. I refused to decide whether there was, under the circumstances, any "particular interference with the business" of the claimant, and held that he was disentitled on the ground that the loss arose "through the enforcement of a regulation of general application." The judgments of Warrington and Scrutton L.JJ. proceeded on the ground that there was no direct interference with the business by Government action, Scrutton L.J. also holding that the loss suffered was "due to the existence of a state of war." It was after the decision of that case in this Court that the claim of the present claimant, Sir A. Black, came before the War Compensation Court. That Court held that because the interference by the Admiralty with Sir A. Black's contract for the building of trawlers was made with knowledge of the existence of that contract, the interference became a direct and particular interference within the meaning of Part II. of the

(1) [1923] 1 K. B. 447.

Schedule. To my mind that knowledge is quite immaterial. The facts of the case are quite short. Sir A. Black had a contract with a firm of trawler builders to build for him a number of trawlers, and the Admiralty were perfectly conversant with the fact of that contract and with the plans on which the boats were to be built. Before any of the trawlers had been begun the Admiralty issued an Order under reg. 8A directing that the builders should not commence any work on the trawlers which they were under contract to build for Sir A. Black, but should occupy themselves with Admiralty work. That was a direction which could only be issued to the builders. If it had been directed to Sir A. Black it would have had no legal justification, but directed to the trawler builders it was perfectly lawful. Under these circumstances the question is whether the claimant gave any evidence that he had suffered a loss for which compensation could be given under the Indemnity Act. His case was that owing to the Order of the Admiralty the builders were building for the Government instead of for him, whereby he was prevented from getting delivery of the trawlers which he would otherwise have got, and suffered in consequence substantial loss. With regard to the provisions of the statute it is necessary to remember what I have already referred to—namely, that although under s. 2, sub-s. 1 (*b*), the claimant must show "direct loss or damage by reason of interference with his . . . . business," sub-s. 2 (iii.) (*b*) of the same section provides that "the compensation is to be assessed according to the principles set forth in Part II. of the Schedule," and that Part provides that the loss must be "by reason of direct and particular interference with his . . . . business." Since the decision of the Compensation Court in this case the *Moss Steamship Co. Case* (1) has been decided in the House of Lords. It was heard before five Lords, and there was a division of opinion, three being in favour of supporting the decision of this Court, and two taking the opposite view, and the reasons given by the majority are not the same. Lord Sumner agreed with the

(1) [1924] A. C. 133.

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judgment of Lord Cave; Lord Haldane, while not in any way dissenting from the ground of Lord Cave's judgment, rested his own judgment upon a different ground. Under those circumstances I think the decision of the House is not strictly binding on this Court, but if we find, as we do find, that the judgments of Lord Cave and Lord Sumner are based upon grounds which directly apply to the particular case which is now under appeal, it would be only respectful to follow them, even if we disagreed with them. But I personally do agree with them. In the case with which they were dealing the interference with the business of the claimant was by an order to the owner of the vessel which took out of the claimant's control a vessel which was not only in existence, but which he was actually using, and for which he had provided employment, and yet in spite of that Lord Cave held that there was no direct interference with the business. He said: (1) "If, therefore, the claimants are to be successful, it must be on the ground that the direction given by the Shipping Controller to the owners to offer the vessel for a voyage to and from the West Indies was a direct and particular interference with the charterers' business. In my opinion it was not such an interference. The direction was not given to the appellants"—so here the direction was not given to the claimant, but to the trawler owners—"and did not prevent them from carrying goods to the Mediterranean if they had or could obtain the shipping necessary for that purpose. No doubt it prevented the owners from performing their contractual obligation under the charterparty to carry goods for the appellants in this ship to the Mediterranean, and so made it more difficult for the appellants to get the goods so carried; but if this was an interference with the appellants' business, the interference was not a direct but a secondary and indirect result of the direction." And later on, after referring to what Sir Dunbar Barton, the dissenting member of the Compensation Court, said in his judgment with respect to a requisition and the loss which might be inflicted on persons who had contracts with the owner of the property

(1) [1924] A. C. 139.

requisitioned, he said, "but in such cases the loss suffered by the contractors is not due to direct interference with their business, but is an indirect consequence of the interference by the Crown with the business of the owner with whom they have contracted." If those grounds are sound in reference to the facts of that particular case, they apply, in my opinion, with even greater force to the facts of this case, because the interference here was not an interference with an existing vessel engaged in profitable employment, but was an interference with the contract of the trawler builders to build vessels which at the time they had not even commenced to build. For the reasons I have given this appeal succeeds.

SCRUTTON L.J. read the following judgment: Sir A. Black claims compensation from the Crown "because he has sustained direct loss or damage by reason of interference with his business" (Indemnity Act, s. 2, sub-s. 1 (b)) through the exercise of a power under the Defence of the Realm Act. What the Admiralty did was to take action under reg. 8A by ordering a firm to stop building trawlers for private customers and build them for the Admiralty. Sir A. Black was a private customer of that firm, with a contract with them to build trawlers for him. He alleges that the performance of that contract was prevented by the Admiralty Order, and that this was an interference with his business by which he sustained direct loss. The Admiralty had a legal right under the Defence of the Realm Act to give that Order, and consequently Sir A. Black had no legal right to compensation apart from the Indemnity Act. His compensation, if any, is therefore to be assessed on the principle of Part II. of the Schedule of the Indemnity Act, by which he is only to have "the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business." Sir A. Black had no property in the trawlers, the construction of which had not commenced. The direct interference must therefore be with his business.

Now the Admiralty could not have ordered Sir A. Black

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not to contract for trawlers or not to try to enforce his contract. The only Order they could make was one restricting the business of the builders; and though a result of this Order might be to interfere with the business of Black, the direct interference would be with the business of the builders. It would still be open to Black to contract with other builders of trawlers not affected by the Order. This appears to be the exact view taken of the meaning of Part II. of the Schedule by Lord Cave as Lord Chancellor in the *Moss Steamship Co. Case* (1), his judgment being concurred in by Lord Sumner. In that case a steamer owned by A. and chartered to B. under a contract not amounting to a demise (so that A. retained the possession) was by order of the Shipping Controller sent to carry sugar for the Sugar Commission from Cuba, instead, as the charterers intended, of proceeding for them to Alexandria. If the steamer had gone to Alexandria the charterers would have made a profit of 6200*l.*; on its Cuba voyage they lost 14,750*l.* The charterers claimed for loss directly suffered by direct interference with their business. There was a clause in the charter that if the steamer was ordered by the British Government to make a voyage this direction should be for charterers' account. All the five Lords who sat disallowed the claim for 14,750*l.*; three of them disallowed the claim for 6200*l.* Of these three, two (Lord Cave and Lord Sumner) rested their judgment on the ground that the direction was given to the owner, and any effect of the direction on the charterers' business was indirect and secondary. Lord Cave says: (2) "The direction was not given to the appellants and did not prevent them from carrying goods to the Mediterranean if they had or could obtain the shipping necessary for that purpose. No doubt it prevented the owners from performing their contractual obligation under the charterparty to carry goods for the appellants in this ship to the Mediterranean, and so made it more difficult for the appellants to get the goods so carried; but if this was an interference with the appellants' business, the interference was not a direct but a secondary and indirect result

(1) [1924] A. C. 133. (2) Ibid. 140.

of the direction. As Sir Dunbar Barton pointed out in his judgment in this case, an interference by requisition or otherwise with the property or business of a hotel, garage, factory or shop may involve as a consequence loss or damage to a number of persons who have contracted with the owner of the property or business for the supply of goods or material, the execution of works, or the future hiring or use of rooms, or of cars, or of the property itself; but in such cases the loss suffered by the contractors is not due to direct interference with their business, but is an indirect consequence of the interference by the Crown with the business of the owner with whom they have contracted. Such persons have no claim to compensation under the Indemnity Act, 1920, their claim being excluded by the word 'direct.'" They also relied on the clause in the charter, holding that to make a direction which brought that clause into operation whereby the charterers' business was affected, was only an indirect interference with and damage of the business, the direct damage being caused by the clause.

The third member of the majority, Lord Haldane, did not express assent to or dissent from the view of Lord Cave and Lord Sumner, but rested his judgment on the clause in the charter, holding that the direct cause of the loss was not the direction of the Government but the agreement of the charterer. Both views appear to me to bind this Court to attach a strict meaning to the term "direct," though technically I do not think the view of two members of a majority of three concurring in the result but arriving at it by different means is binding on this Court as to the means.

The majority of the House of Lords approved in the result the dissenting judgment in the Court below of Sir Dunbar Plunket Barton, and I personally do not understand how that judgment is reconcilable with his judgment in this case in favour of the claimant. I think also the reasoning of Lord Cave and Lord Sumner is inconsistent with the judgment of the majority of this Court in the *Elliott Tug Case.* (1) There the charterer of a tug under a

(1) [1922] 1 K. B. 127.

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charter, not amounting to a demise, was deprived of the use of the tug by a requisition from the Crown. By mistake that requisition was at first addressed to the charterer, not to the owner, though the right of the charterer to the use of the tug was not by right of property but only by virtue of contract. When the mistake was discovered the requisition was addressed to the owner. The majority of this Court held that there was a direct loss by direct interference with the charterers' business, though for other reasons they held the charterer could not recover. Some members of the House of Lords distinguished this case from the case before them by saying there was a requisition. I respectfully do not understand the difference; the property requisitioned was that of the owner, the charterer had no property to be requisitioned. It appears to me that on the principles of Lord Cave and Lord Sumner the decision in the *Elliott Tug Case* (1) as to direct loss and interference should have been the other way.

The decision appealed from in the present case was given before the decision of the House of Lords in the *Moss Steamship Case.* (2) I think that decision binds us to put a strict meaning on "direct loss" and "direct interference," and I agree with the reasoning of Lords Cave and Sumner. In the present case the interference was with the business of the builder, and it indirectly affected the business of those who had contracts with the builder. They could, however, make contracts with other builders of trawlers, of whom there were many. If these were unprofitable the further question would arise whether the loss was solely due to a state of war. As I stated in my judgment in the *Elliott Tug Case* (1), I regard with great apprehension the consequences of a decision which would enable all those who had contracts with a person or in respect to a subject matter directly affected by Government action to allege that their business was also directly affected, and claim compensation.

A claim faintly put forward by the Crown, that the order to the builder was a general order, and therefore no

(1) [1922] 1 K. B. 127. (2) [1924] A. C. 133.

compensation was payable for its results, in my opinion completely failed on the facts.

The appeal, in my opinion, should be allowed and judgment entered for the Admiralty with costs.

SARGANT L.J. read the following judgment: In my opinion, the Order in this case was not an order or regulation of general or local application. It was one of several similar Orders given to particular builders selected by the Admiralty without regard to any one particular locality. These Orders do not together amount to an Order of general or local application. A more difficult question is whether the loss in question is "direct loss or damage suffered by the claimant by reason of direct or particular interference with his property or business." Now here the Order given was one initially and primarily given to Messrs. Cook & Co. in respect of their business of shipbuilding, and it cannot, I think, be doubted that if they had suffered loss by reason of the Order and were now claiming, they would be entitled to recover the amount of their loss as having been suffered by reason of a direct and particular interference with their business. This, however, may not prevent the present claimant from recovering if he also has suffered loss, provided that such loss has been in respect of direct or particular interference with his business. But is that so in his case also? In my judgment the reasoning of the Lord Chancellor, adopted by Lord Sumner, in the very important recent case of the *Moss Steamship Co.* v. *Board of Trade* (1), shows that this question must be answered in the negative. It seems to me that any interference with the claimant's business here was "a secondary and indirect result" of the direction given by the Admiralty within the meaning of that phrase, as used by the Lord Chancellor. It was due not solely to the direct interference with the builders' business but to the additional circumstance that the transactions of that business included a contract which had been made with the claimant in the course and for the purposes of his business. It is true

(1) [1924] A. C. 133.

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that Lord Haldane in that case arrived at the same conclusion as the Lord Chancellor and Lord Sumner for very different reasons, and that Lord Finlay and Lord Parmoor concurred that the interference with the business of the claimants was direct and particular. But I do not look on their judgments as altogether inconsistent with the general view of the Lord Chancellor, though they arrive at a different result in that particular case. The nexus of cause and effect was a good deal stronger there than here, inasmuch as the steamship company were actually employing in their business and determining the destination of the steamship taken, and it was that employment and that destination which were interfered with. Here there was a direction applying to al contracts of the kind in regard to which no instalment had been paid; and though these contracts included that with the claimant this was only because it happened that these contracts were incidental to the builder's business. And further, in the present case the claimant was not having any actual use or enjoyment of the subject matter of the contracts.

A good deal was attempted to be made of the fact that the Admiralty knew of the contract with the claimant, and that such a prohibition of an existing contract might have been actionable had it emanated from a private individual and had not had statutory authority. But in my judgment this is immaterial. The right to compensation in such cases as this is not made dependent on there having been a good cause of action apart from statutory authority to do the act complained of; and in any case a claim for inducing the breaking of a contract would lie in tort, and so would not be enforceable against the Crown, even apart from statutory authority.

Appeal allowed. Leave to appeal.

Solicitor for the appellants: *Treasury Solicitor.*

Solicitors for the respondent: *Peacock & Goddard, for Grange & Wintringham, Grimsby.*

J. F. C.

Followed. CUNNINGHAM - HOWIE *v.* DIMBLEBY [1951] 1 K. B. 360

[IN THE COURT OF APPEAL.]

C. A. 1924 *Jan.* 29.

THE AGA KHAN *v.* TIMES PUBLISHING COMPANY.

[1923. A. 1699.]

Practice—Libel—Plea of fair Comment—"Rolled-up plea"—Particulars of Statements relied on as Facts and of those relied on as Comment.

Where in an action of libel the defendant relies on the defence of fair comment, and pleads it in the form now commonly known as the "rolled-up plea"—i.e., "In so far as the said words consist of allegations of fact the said words are in their natural and ordinary meaning true in substance and in fact, and in so far as the said words consist of expressions of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest," the Court will not order the defendant to specify which of the words complained of he relies on as being statements of fact, and which as being expressions of opinion, for it is for the jury to determine to which class the several statements belong, and the defendant ought not to be called upon to forecast the findings of the jury; nor will the Court order him to give particulars of the facts on which he relies as being the basis of his comments, if the plea (as above) limits those facts to "the said facts," for the plaintiff is thereby given all the information on the subject that he can require.

Secus, if the plea is pleaded generally without that limitation.

APPEAL from an order of Roche J. at chambers.

The action was for libel. The plaintiff, an Indian prince, who was an owner of racehorses, complained in his statement of claim of certain articles published in different issues of the Times newspaper relating to the running of two fillies belonging to him, named Paola and Teresina, which articles it was alleged were libellous, as imputing to him that he dishonestly arranged for the said horses being run in such a way as to conceal their real form and racing qualities, with a view to deceiving the public generally and particularly the handicappers who would have to decide upon the weights to be carried by the said horses in future races. The articles complained of were set out in paras. 3, 4, 5, 6 and 7 of the statement of claim. The article in para. 3 stated that the plaintiff had both the said fillies running in the Coronation Stakes, and that he put his second colours on Paola, who in the result was an easy winner, Teresina being second. The

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article went on to say: "The Aga Khan would have been well advised to have run only one of his fillies. Either could have won." The article in para. 4, after stating that the plaintiff had entered Paola for the Jersey Stakes when she was looking light and distinctly off colour, and that she finished last, said: "The Aga Khan was surely ill advised to run so beautiful a filly as Paola when she was so obviously not at her best." The article in para. 5 said: "It is a long time since a filly won the Eclipse, but Teresina has an undoubted chance of winning this week. There will, however, be many people who will not be at all sorry if she is beaten, and I cannot see that she is certain to win." In the article in para. 6, which related to the Eclipse Stakes, the matter complained of was: "It is said openly on the racecourse and in places where serious betting is being done that Teresina is very much better than her public form suggests. It is said that she has been kept especially for this race." The last article, that in para. 7, dealt with the result of the same race, the Eclipse Stakes. It stated as follows: "There was an unfortunate ending to the race at Sandown Park yesterday for the Eclipse Stakes for Lord Astor won the race, not with the first favourite, Bold and Bad, but with Saltash, who carried the second colours and won at 20 to 1 against. . . . . This is the second occasion this season that an owner has won an important race with his second string. The Aga Khan won the Coronation Stakes at Ascot with Paola, who carried his second colours, Teresina carrying his first colours. There is however a great difference in these two cases. . . . . No one suggests for a moment that the result of the race is anything except unfortunate for the public, and I am convinced that Lord Astor feels very keenly the fact that they have lost their money over the result. Neither he nor Taylor (Lord Astor's trainer) has done anything which should not have been done according to the laws of racing." The defendants admitted publication, but denied that the words complained of in the said five paragraphs were defamatory, and in para. 3 of the defence pleaded that: "In so far as the said words consist of allegations of fact

the said words are in their natural and ordinary meaning true in substance and in fact, and in so far as the said words consist of expressions of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest." The plaintiff took out a summons for an order that the defendant should give particulars of para. 3 of the defence: 1. Of the words set out in paras. 3, 4, 5, 6 and 7 of the statement of claim, which the defendants say are allegations of fact and upon which they intend to rely. 2. Of the words set out in the said paragraphs, which they say are expressions of opinion and upon which they intend to rely. 3. Of the facts in respect of which such expressions of opinion are made and upon which the defendants intend to rely. The Master dismissed the summons. On appeal Roche J. made an order for particulars of heads 1 and 2, but dismissed the appeal with respect to head 3, the defendants' counsel stating that the allegations of fact commented on were those set out in the statement of claim and no others. The plaintiff applied to amend the summons as to head 3 by substituting for the order asked the following: "Of the facts relied upon in support of the allegation that the statements alleged to be statements of fact are true," but the judge refused to allow the amendment.

Both parties appealed.

Eustace Hills K.C. and *Wilfrid Lewis* for the defendants. The so called "rolled-up plea" which has been pleaded in the present case is now generally recognized to be a plea of fair comment and nothing else. The averment that in so far as the words complained of are statements of fact they are true is not intended to be a plea of justification. "It is a necessary part of a plea of fair comment to show that there has been no misstatement of facts in the statement of the materials upon which the comment was based": per Collins M.R. in *Digby* v. *Financial News*. (1) A defendant must not first invent his facts and then comment on them.

(1) [1907] 1 K. B. 502, 508.

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But even if the plea is to be treated as a combined plea of fair comment and justification the Court will not order the defendants to distinguish which statements are fact and which are comment. In *Lyons* v. *Financial News* (1), where the plea was pleaded in the same form as here, Channell J. ordered the defendants to give particulars distinguishing and stating separately the facts which they justified as true and those on which they relied as being matters on which they were entitled to comment. On appeal Fletcher Moulton and Buckley L.JJ. set aside that order. A fortiori will the Court not allow such an order if the plea is to be treated as one of fair comment only? The order would unfairly embarrass the defendants, for it would call upon them to guess what the probable findings of the jury would be on the question whether particular statements were fact or comment, and would give no corresponding assistance to the plaintiff.

Harold Morris K.C. and *A. B. Aspinall* for the plaintiff. This particular form of plea was first made use of in 1890 in *Penrhyn* v. *Licensed Victuallers' Mirror.* (2) There Mathew and Grantham JJ. held that it was not embarrassing or misleading, but they ordered particulars to be given of it. It is in reality a plea of fair comment coupled with a plea of justification: per Vaughan Williams L.J. in *Plymouth Mutual Co-operative Society* v. *Traders' Publishing Association* (3); and the plaintiff is entitled to know which are the facts the defendants say they justify. It is vital to the plaintiff to know what is alleged to be the difference between his case and Lord Astor's. If however the plea is only a plea of fair comment the plaintiff is entitled to particulars of the facts on which the defendants rely as materials for their comment, and, on the basis of head 3 of the summons not being amended, he is entitled to particulars of head 3 as originally drawn. In *Peter Walker & Son* v. *Hodgson* (4) particulars were ordered "of the materials on which the comment was based." (5) And in an appeal heard before Scrutton and Warrington L.JJ.

(1) (1909) 53 Sol. J. 671.
(2) (1890) 7 Times L. R. 1.
(3) [1906] 1 K. B. 403, 411.
(4) [1909] 1 K. B. 239.
(5) Ibid. 243.

in July last: *Municipal Mutual Insurance Co.* v. *Policy Holders' Journal* (1), the Court made an order for particulars in the form asked for in the present summons.

BANKES L.J. This appeal raises a question which has been the subject of considerable discussion in many cases, a discussion which has been brought about by the form of the plea in which the defence of fair comment is now generally pleaded. The plaintiff complains of a series of libels contained in issues of the Times. The defendants admit publication, but deny that the words complained of are defamatory, and say that, assuming they are defamatory, the defence is fair comment. That defence is pleaded in what is now the generally accepted form, and we must deal with it as we find it. The application was that the defendants should give particulars of the words in paras. 3, 4, 5, 6 and 7 of the statement of claim, stating which are statements of fact, and which are expressions of opinion. I have known many attempts to get an order for particulars in the form now asked for, but have never known such an order to be made until the recent case of *Municipal Mutual Insurance Co.* v. *Policy Holders' Journal* (1), where an order was made by Scrutton and Warrington L.JJ. I do not know anything of the facts of that case, but Scrutton L.J. tells us that the statements in the pleadings were very confused, and that orders had been made that were difficult to reconcile, and that as a result a special order was made, which no doubt was right under the circumstances of that particular case. But it is not to be regarded as a precedent for other cases, and I do not think it is applicable to the present case; and the reason why I come to that conclusion is that it is an accepted rule that a party is entitled to an order for particulars only for the purpose of ascertaining the nature of his opponent's case that he has to meet, and not for the purpose of ascertaining the evidence by which his opponent proposes to prove it. In many actions for defamation the defendant has pleaded the defence of fair

(1) July, 1923. Not reported.

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comment in a general form, that is to say, has alleged that the words complained of are fair comment on matters of public interest, without indicating what those matters are. In such cases I agree that an order should be made requiring him to indicate what those matters are. But here the plea itself states the matters upon which the comment is based, and the defendant ties himself down to the admission that it is the statements of fact contained in the libel, and no others, on which he intends to rely. It cannot possibly assist the plaintiff that the defendants should be required to pick out the statements which they say are statements of facts and those which they say are matters of opinion, for the category to which the several statements belong is a question for the jury, subject to a direction from the judge. In some cases the judge may tell the jury that a particular statement is a statement of fact and is not capable of being considered an expression of opinion. On the other hand there may be statements with respect to which different minds may take different views on the question whether they are statements of fact or expressions of opinion. As illustrative of that I may refer to the case of *Dakhyl* v. *Labouchere* (1), in which I was counsel. In that case the libel was that the plaintiff was "a quack of the rankest species." The trial judge ruled that the statement was a statement of fact and that it was not open to the defendant to endeavour to satisfy the jury that, under the circumstances in which the words were used, they were a comment upon the conduct of the plaintiff. The House of Lords directed a new trial upon the ground that the statement was one which, under the circumstances, the jury might properly, if they thought fit, treat as an expression of opinion. To ask the defendants in the present case to go through the libel and point out which statements are statements of fact and which are comment would only result in this—the defendants would pick out what are obviously facts and say they are facts, and would also pick out what are obviously matters of opinion and say that they are matters of opinion.

(1) [1908] 2 K. B. 325*n*.

With respect to any statements, as to which it was doubtful to which class they belonged, the defendants would be entitled to say that it was a question for the jury, that they might be fact or they might be opinion, and that under those circumstances the defendants relied upon them as both. If they did it would be impossible to strike out particulars so framed. In this case I think the defendants have sufficiently indicated the materials on which their comment is based. It would serve no useful purpose to make an order in the form asked for by the first two paragraphs of the summons; while the third paragraph, as unamended, amounts to the same thing as the first, and, as proposed to be amended, is nothing but an application for particulars of the evidence on which the defendants seek to establish their case. For these reasons the defendants' appeal succeeds, and the plaintiff's cross-appeal fails.

SCRUTTON L.J. As to the cross-appeal I have no doubt. As the summons was originally drawn head 3 appears to me to ask the same thing as head 1. As amended it appears to ask for the evidence by which the defendants are going to prove the facts, and is therefore contrary to all principle.

As to the appeal I personally have much more doubt. I do not profess to have had much experience, as counsel, of libel actions; my experience of such actions has been mainly that of a judge trying them, and as a judge I have formed the strongest objection to the so called "rolled-up plea." If a defence to an action for libel were pleaded strictly, justification, in the wide sense in which Collins M.R. used that term in *Digby* v. *Financial News* (1), as one which "must cover any imputation which the words in their context may be taken to convey," would be pleaded separately, and the pleader would allege that the statements of fact in the libel were true, and that the imputations conveyed by the words complained of in their ordinary meaning were also true in the sense that they were justifiable imputations. Then the defence of fair comment would be pleaded in another

(1) [1907] 1 K. B. 502, 509.

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paragraph, and unless it set out the facts upon which the comments alleged to be fair were based, the defendant might be ordered to give particulars of those facts. But unfortunately some thirty years ago the two pleas were apparently rolled into one, and since then there has been much difference of opinion in the Court of Appeal whether that rolled-up plea was a plea of justification coupled with a plea of fair comment, or was a plea of fair comment only. In *Plymouth Mutual Co-operative Society* v. *Traders' Publishing Association* (1) and *Lyons* v. *Financial News* (2) the Court of Appeal treated it as embodying both defences; in *Digby* v. *Financial News* (3) and *Peter Walker & Son* v. *Hodgson* (4) as being a plea of fair comment only. The words of the plea, "In so far as the words consist of allegations of fact the said words are in their natural and ordinary meaning true in substance and fact," taken by themselves, seem to me clearly to be a plea of justification, because they justify the words in their natural and ordinary meaning, and it is the natural and ordinary meaning which conveys the defamatory imputation. Personally, if I were not hampered by authority, I should be inclined to say in every case in which this rolled-up plea is pleaded that the plaintiff is entitled to ask the defendant to specify the statements of fact which he says are true, and the comments which he says are fair. It is quite possible that the adoption of such a practice might, as my Lord suggests, result in the pleader making an alternative allegation: "If this is a statement of fact it is true, if it is a comment on a fact it is fair," but at any rate it would result in much greater clearness of mind in the pleader, and would afford much assistance to the judge who had to try the case. But I cannot overlook the fact that there has been a series of cases in which it has been held that particulars ought not to be given of the rolled-up plea where the comment is alleged, as here, to be "on the said facts." Where the comment is alleged generally to be "on a matter of public interest" particulars are, as far as I know, always

(1) [1906] 1 K. B. 403.
(2) 53 Sol. J. 671.
(3) [1907] 1 K. B. 502.
(4) [1909] 1 K. B. 239.

ordered, in order that it may be seen what facts beyond those stated in the libel the defendant intends to rely on. In *Lyons* v. *Financial News* (1), where the words complained of were said to be "fair comment upon a matter of public interest—namely, the said facts," and Channell J. made an order for particulars distinguishing the facts which the defendants justified as being true and those which they relied on as being matters on which they were entitled to comment, the Court of Appeal set aside the order; and I find that the general trend of the decisions in this Court is in the direction of not making the order where the facts, the comment on which is said to be fair, are defined as being the facts stated in the libel.

No doubt in *Municipal Mutual Insurance Co.* v. *Policy Holders' Journal Co.* (2) in July last Warrington L.J. and I made an order in this form, but it was a peculiar case. The Master had made an order which resulted in a long series of particulars being delivered. When the case came before Rowlatt J. he ordered all the particulars delivered to be withdrawn, on the ground that it would have been difficult for the parties to get to trial at all so long as they stood, and he made an order in another form, which resulted in particulars rather worse than the previous ones. The Court of Appeal, looking at the two orders and at the form of the libel, which was an extremely difficult one to deal with, set aside the second set of particulars and directed the defendants to say what they meant by the plea. That decision of Warrington L.J. and myself, although it would be a very useful order to make in a good many cases, cannot be regarded as one of general application, and I do not feel able to dissent from the order which my brothers propose.

SARGANT L.J. I am afraid I am in a worse position than the other members of the Court to deal with this appeal, because I cannot claim to have had any experience of actions of defamation either as counsel or as judge. But I look at the ordinary uses of particulars, which I understand to be

(1) 53 Sol. J. 671. (2) July 23. Not reported.

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to define the issues and thereby to prevent either party being taken by surprise, and incidentally to limit as much as possible the expense of trials. Now here it seems that there is in para. 3 of the defence a sufficient definition of the facts on which the defendants rely as the basis of their comments by reason of the introduction of the words "upon the said facts," that is to say, the facts appearing in the articles complained of. That limitation of the facts on which the defendants rely prevents them from bringing in in support of their defence an indefinite number of other facts not included in the articles. It is quite true that the plaintiff may find some difficulty in distinguishing between the parts of the articles which consist of facts, and those which consist of comments, but it may also be that that difficulty is incapable of solution until the case has been tried by a judge and jury. The order appealed from seems to call upon the defendants at this stage to tie themselves to what the jury are going to say are facts and what they are going to say are comments. It would be extremely embarrassing to the defendants, and would not be of any substantial value to the plaintiff for the purpose for which particulars are customarily ordered. I think therefore that the defendants' appeal ought to be allowed. As regards the plaintiff's cross-appeal, when he asks that the defendants shall be ordered to give particulars "of the facts relied upon in support of the allegation that the statements alleged to be statements of fact are true," I think he is making as bold a request for particulars of the evidence which the defendants are going to call in support of their case as I have ever seen.

Appeal of the defendants allowed.
Cross-appeal of the plaintiff dismissed.

Solicitors for the plaintiff: *Wm. Easton & Sons.*
Solicitors for the defendants: *Soames, Edwards & Jones.*

J. F. C.

Referred to. NAKKUDA ALI *v.* JAYARATNE [1951] A. C. 66

[IN THE COURT OF APPEAL.]

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1923
Nov. 30;
Dec. 19.

KEEVES *v.* DEAN.

NUNN *v.* PELLEGRINI.

Landlord and Tenant—Notice to quit—Tenant holding over—Statutory Tenant—Right of, to assign his Interest—Increase of Rent, &c., Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*); *s.* 15, *sub-ss.* 1, 2.

The right of a statutory tenant under the Increase of Rent, &c., Act, 1920, is merely a personal right to retain possession of the premises, and cannot be assigned to another person.

Judgment of the Divisional Court reversed.

TWO APPEALS from the judgment of a Divisional Court. (1)

KEEVES *v.* DEAN.

The plaintiff in 1920 let a dwelling house at Thornton Heath to one Percy Beach as a weekly tenant at a rent of 12*s.* 6*d.* a week. There was no written agreement of tenancy. On August 19, 1922, the plaintiff gave Beach notice to quit the premises before August 28. Beach did not quit, but remained in possession as statutory tenant under the protection of the Increase of Rent, &c., Acts. On January 5, 1923, Beach's solicitor wrote to the plaintiff giving him notice that Beach had assigned his interest in the premises by indenture to the defendant Dean. Beach vacated the premises and Dean entered into possession. The plaintiff brought this action in the Croydon County Court to recover possession of the premises upon the ground that a statutory tenant cannot assign his interest and that the defendant was a trespasser. The county court judge, who was of opinion that the rights of a statutory tenant were purely personal and therefore not assignable, made an order for possession. The deed of assignment by Beach to the defendant, which purported to assign the hereditaments and all the assignor's estate and interest in them in consideration of a price of 400*l.*, was not put in, apparently because the view of the county court judge made it unnecessary to do so. On

(1) [1923] 2 K. B. 804.

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appeal the Divisional Court (Sankey and Salter JJ.) reversed the decision of the county court judge, holding that, in the absence of any prohibition against assignment in the original contract of tenancy, the statutory tenant was given a right to assign by s. 15, sub-s. 1, of the Increase of Rent, &c., Act, 1920. (1) They were of opinion that a right to assign was one of the terms or conditions of the original contract of tenancy.

The plaintiff appealed.

Merriman K.C. and *A. H. King* for the appellant. A statutory tenant cannot assign. Even if a right to assign is a term or condition of the original tenancy it is not one to which the statutory tenant is entitled, for by s. 15, sub-s. 1, of the Act of 1920 he is only entitled to the benefit of such terms and conditions "so far as the same are consistent with the provisions of this Act," and a right of assignment is wholly inconsistent with those provisions. It is only so long as he "retains possession" that the statutory tenant has any interest in the premises. The moment he goes out his interest is gone. He has nothing more than a personal right to be undisturbed in his possession, and that cannot be assigned.

[LUSH J. His interest seems to be nothing more than a status of irremovability.]

That a statutory tenancy is wholly different in kind from an ordinary tenancy by agreement is clear from *Brewer* v.

(1) By s. 15, sub-s. 1, of the Increase of Rent, &c., Act, 1920: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act."

Sub-s. 2: "Any tenant retaining possession as aforesaid shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration, by any person other than the landlord, and any person acting in contravention of this provision shall be liable on summary conviction to a fine not exceeding 100*l.*, and the Court by which he was convicted may order any such payment or the value of any such consideration to be paid to the person by whom the same was made or given."

Jacobs (1), where it was held that a statutory tenant is not entitled to the protection of s. 14 of the Conveyancing Act, 1881, which requires, as a condition precedent to re-entry by the landlord for breach of the conditions of the tenancy, that a notice specifying the breach complained of should have been served on the tenant. Certain decisions were referred to in the Court below as showing that the statutory tenant has more than a mere personal right. In *Parkinson* v. *Noel* (2) it was held that the interest of the statutory tenant was "property" within the meaning of s. 167 of the Bankruptcy Act, 1914, which devolved upon his trustee. But the ground of that decision was that under s. 15, sub-s. 2, of the Act of 1920 the tenant had the right to bargain with his landlord as to the terms on which he would be willing to give up possession, a right which had a pecuniary value. Moreover, involuntary devolution by operation of law stands on a very different footing from a voluntary act such as assignment. It has been held over and over again that a covenant not to assign is not broken by the bankruptcy of the tenant, even when he is adjudicated on his own petition. It is true that Greer J. in *Parkinson* v. *Noel* (3) went on to suggest that the statutory tenant may "sublet part of the premises," and in the present case Sankey J. said that he was "not at present convinced that the Act does not allow the creation of sub-tenancies by the statutory tenant," without limiting his proposition to a part of the premises. But even if that proposition is sound it may possibly be explained by the fact that the tenant so subletting remains in possession of the term. Further, a right to assign is not a term or condition of the original contract of tenancy within the meaning of s. 15, sub-s. 1. It may be incidental to it, but it is not a term of it.

Lord Halsbury K.C. and *Oddy* for the respondent. The right to assign a tenancy is an implied term of the original contract. No substantial distinction can be drawn between a "term of the contract" and a "term incidental to it." If

(1) [1923] 1 K. B. 528. (2) [1923] 1 K. B. 117.
(3) [1923] 1 K. B. 117, 119.

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that be so the assignment is not open to the objection that it is inconsistent with the provisions of the Act, for the word "tenant" in s. 15, sub-s. 1, must be read by the light of the definition of that expression in s. 12, sub-s. 1 (*f*), and s. 15 must be read as if the words were "any tenant or other person deriving title under the tenant who retains possession, &c." There is no moment of time when either the original tenant or his assignee is not in possession.

NUNN *v.* PELLEGRINI.

The plaintiff, Walter Nunn, was the landlord of a dwelling house and shop at 1 Upper Barclay Street, Ipswich. In 1920 the premises were let to C. Stebbings on a weekly tenancy at a rent of 9s. per week. At various dates in 1920, 1921, and 1922 the rent was increased within the limits allowed by the Increase of Rent, &c., Act, 1920. In the letting to Stebbings there was no prohibition against assignment, but in the rent-books from 1921 onwards there was a prohibition against subletting. In December, 1922, the defendant bought from Stebbings the goodwill, fixtures, and stock of the business which had been carried on at the premises. A document not under seal was drawn up embodying the contract of sale, but though it was part of the bargain that Stebbings' interest in the tenancy should be transferred to the defendant, the document was silent as to the assignment of that interest. Stebbings then erased his name from the outside of the rent-book and inserted the defendant's name, handing the book to the defendant. The defendant received the key of the premises and entered into possession. She then tendered rent to the plaintiff, but it was refused. In March, 1923, the plaintiff brought this action in the Ipswich County Court, claiming possession of the premises and mesne profits. The defendant claimed to be in lawful occupation as tenant to the plaintiff, or in the alternative as sub-tenant of Stebbings, and also claimed the protection of the Increase of Rent, &c., Act, 1920. The county court judge held that the statutory tenancy of Stebbings had never come to an end; that a statutory tenancy was

assignable: *Parkinson* v. *Noel* (1); that there was no term in Stebbings' tenancy prohibiting assignment; that in this case, if a deed were necessary for a legal assignment, a Court of equity would grant specific performance of the agreement of December 20, 1922, and that since the Judicature Act, 1873, the equitable assignee was in as good a position as if a deed had been executed: *Manchester Brewery Co.* v. *Coombs.* (2) He therefore gave judgment for the defendant. On appeal the Divisional Court (Sankey and Salter JJ.) affirmed the judgment of the county court judge. (3)

The plaintiff appealed.

C. E. Jones and *Vaisey* for the appellant. A so-called statutory tenancy is not assignable. It is not a tenancy at all. The so-called tenant has no term. He has no more than a permission to remain where he is on certain conditions, and this permission is, like any other licence, personal to him. If he leaves the premises the permission ceases with his departure. In this respect it resembles a lien. If it is assignable at all it can only be assigned gratuitously; an attempted assignment for good consideration would be contrary to s. 15, sub-s. 2, of the Act of 1920, and ineffective. If the interest is properly called a tenancy, then a tenancy can only be assigned by deed: Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. Therefore there was no assignment at law. Assuming that there was a contract to assign, it was not a contract of which a Court of equity would grant specific performance; for either there was no consideration at all, or else there was a consideration which was illegal as being contrary to s. 15, sub-s. 2, of the Act of 1920. In neither case would a Court of equity assist the assignee. It follows that there was no assignment either at law or in equity.

W. R. Elliston for the respondent. Assignment of a statutory tenancy is nowhere forbidden by the Act. That being so the right to assign is incident to a lessee's estate:

(1) [1923] 1 K. B. 117. (2) [1901] 2 Ch. 608, 617.
(3) [1923] 2 K. B. 806.

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Church v. *Brown* (1), per Lord Eldon. The statutory definition of "tenant" in s. 12, sub-s. 1 (*f*), of the Act of 1920 as including "any person from time to time deriving title under the original tenant" presupposes an assignment. There are several instances in which an assignment of a statutory tenancy by operation of law has been recognized; for instance to an administratrix: *Mellows* v. *Low* (2); to an executor: *Collis* v. *Flower* (3); to a trustee in bankruptcy: *Parkinson* v. *Noel.* (4) The proper conclusion from these cases is that the Legislature intended that a statutory tenancy should be assignable.

BANKES L.J. These two appeals from the Divisional Court raise a very important question under the Increase of Rent, &c., Act, 1920—namely, whether a person who has been a tenant of a dwelling house, whose tenancy has been determined by notice to quit, but who has remained in possession against the will of his landlord, can assign his statutory position to another person. The person who so seeks to assign has come to be known as a "statutory tenant," and I think it is a pity that that expression was ever introduced. It is really a misnomer, for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies. I desire to reserve the question as to the right of a person who succeeds on the death of the statutory tenant. The two cases of *Collis* v. *Flower* (3) and *Mellows* v. *Low* (2) were both cases in which the original tenancy had not been determined at the date of the death, and in which therefore the position of a person claiming under a will, or as administrator, of a tenant dying after the statutory tenancy had begun did not directly come in question. It is true that in the last named case

(1) (1808) 15 Ves. 258, 264.
(2) [1923] 1 K. B. 522.
(3) [1921] 1 K. B. 409.
(4) [1923] 1 K. B. 117.

McCardie J. expressed the view that it made no difference whether the death was before or after the termination of the original tenancy, but that was only obiter. I confine my judgment to-day strictly to the question whether the so-called statutory tenant can assign his statutory position in his lifetime. That I think depends upon the construction to be placed upon s. 15, sub-s. 1, which provides as follows: [His Lordship read the sub-section.] It is said that the right to assign the tenancy is a term or condition of the original contract of tenancy in every case in which that contract does not forbid such an assignment, and that consequently any tenant whose contract does not include a condition against assignment is entitled to assign. It is well established by two decisions of this Court: *Remon* v. *City of London Real Property Co.* (1) and *Cruise* v. *Terrell* (2), that a person who is in possession by virtue of the provisions of the statute only is a "tenant" within the meaning of s. 15, sub-s. 1. I do not think that the right to assign a tenancy can be properly described as a term or condition of the original contract of tenancy, if those words are to be understood in their ordinary sense; it is certainly not an express term; nor, in my opinion, can such a term be implied. The right to assign is a right incident to the estate, just as a right to sell your watch, or horse, or any other chattel that may belong to you is a right incident to your ownership of the chattel, and the right to assign the one is no more a term or condition of the contract of tenancy than the right to sell the other is a term or condition of the contract under which the chattel was purchased. There are two authorities to which I should like to refer in connection with that point. One is a passage in the judgment of Lord Kenyon in *Doe* v. *Carter* (3), where he says: "Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant." To the same effect is the

(1) [1921] 1 K. B. 49. (2) [1922] 1 K. B. 664.
(3) (1798) 8 T. R. 57, 60.

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language of Lord Eldon in *Church* v. *Brown* (1), where the question was whether under an agreement for a lease, which did not expressly stipulate for the insertion in the lease of a covenant not to aliene without licence, such a covenant was to be regarded as a proper and usual covenant, the Lord Chancellor said: "With regard to leasehold estates I should lay no stress upon the word 'assigns'; if the lease was to be made to the lessee, his executors or administrators: his assigns being included in himself; and the right to assign, unless restrained, being incident to his estate." If, therefore, one construed the words "terms and conditions of the original contract of tenancy" according to their natural meaning they cannot, in my opinion, include such a right as the right to assign. But one has to look at this Act as a whole to see whether it is necessary, in order to carry out the object of the Act, to put upon the language used some meaning other than the ordinary meaning. As I have already pointed out, this Court has held that it was obliged to give to the expression "tenant" in this section a meaning other than that ordinarily attached to that expression; but it seems to me that it is manifest, from a consideration of the provisions of sub-s. 2, that the Legislature when using the words "terms and conditions of the original contract of tenancy" used them in their strict legal sense. I arrive at that conclusion for this reason: sub-s. 2 says that "any tenant retaining possession as aforesaid," that is in the manner provided by sub-s. 1, shall not part with that possession for valuable consideration to any one except his landlord, and that if he does so he shall be liable to a penalty, and the person who pays the consideration may recover it back as having been paid under a void agreement. But the Legislature when so enacting knew perfectly well that no assignment of a statutory tenancy would ever be likely to be made except for valuable consideration, in other words that ninety-nine out of every hundred of such assignments would be for valuable consideration. If so an

(1) 15 Ves. 258, 264.

enactment that the tenant should not assign for valuable consideration except to his landlord was practically the same thing as saying that he should not assign to any one except his landlord. The conclusion at which I have arrived upon the construction of sub-s. 1, when read by the light of sub-s. 2, is that the statute was not intended to confer upon the so-called statutory tenant a right to transfer his legal position under the statute to another person by assignment. I say nothing about subletting, because it may be that a statutory tenant who has sublet part only of the premises which he claims the right to retain and which he occupies is still entitled to the protection of the statute. What the position would be if he were to sublet the whole of the premises, and whether under those circumstances any distinction could be drawn between subletting and assignment, it is not necessary here to determine, and I do not decide it.

I have dealt so far with the construction to be put upon the Act generally without reference to the facts of these two particular cases, but, having regard to the construction which I put upon the Act, it is not necessary to draw any distinction between the two cases. In both of them the tenancy of the original tenant had been determined by notice to quit, and the person who claimed the right to assign his statutory position was in possession of the premises solely under the provisions of the statute. To that extent the facts of the two cases are the same. In the first case the assignment was not put in, and therefore the Court had not to consider whether it was for valuable consideration or not; but from my point of view that is immaterial, having regard to the construction which I put on s. 15, sub-s. 1. In the second case the document which was said to be the assignment was put in, and it was certainly not more, putting it at the highest, than an agreement to assign. If then it was an agreement to assign for valuable consideration it came directly within s. 15, sub-s. 2, and was void for illegality. If, on the other hand, it was without consideration, with all respect to the Divisional Court, I fail to see how any

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appeal to a Court of equity would assist the party claiming under it. For these reasons I think that the decision of the Divisional Court cannot be supported in either case, and that the appeals must be allowed, the judgment of the county court judge being restored in the first case and set aside in the other.

SCRUTTON L.J. This case is another stage in the unwelcome task which Parliament has imposed upon the Courts of defining the position of the "statutory tenant." My Lord has objected to his being called by that name, on the ground that he is not a tenant at all. But it is a convenient expression, and, although it is true that before the passing of these Acts no one would have spoken of a person who after the expiry of his tenancy remained in possession against the will of his landlord as a tenant, Parliament has certainly called him a tenant, and he appears to me to have something more than a personal right against his landlord. I take it that he has a right as against all the world to remain in possession until he is turned out by an order of the Court, and that he could maintain trespass against any person who entered the premises without his permission. However, it does not much matter what he is called so long as it is clear that one is speaking of a person who holds over after the expiry of his tenancy against his landlord's will. The question in this case is whether such a person can assign his right, whatever it is, to another; and one can well see that that in turn may give rise to certain other questions which it is not necessary now to decide, whether he can leave his interest in the premises by will, or whether he can sublet either a part or the whole of the premises for less than the actual term for which he himself holds them. The answer to the question whether he can assign is to be found in the consideration of the meaning of s. 15, sub-s. 1, of the Act of 1920. [His Lordship read the sub-section.] That appears to me to raise two questions: First, was it a term or condition of the original contract of tenancy which was determined by the notice to quit that the tenant should be entitled

to assign? Secondly, if it was a term or condition of that contract, was its application to the statutory tenancy consistent with the provisions of the Act? Now I am not able to agree with my Lord on the question whether it was a "term or condition" of the original contract in the sense in which those terms are used in this Act. I think it is clear that it was an incident of the original contract. As Lord Kenyon said in the case (1) to which my Lord has referred: "Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant," and I take it that unless there is an express term forbidding alienation a tenant has a right to assign his tenancy. I cannot agree with the view that the expression "terms or conditions" of the contract of tenancy as used in this section is to be construed so strictly as to exclude incidents of the tenancy. For instance, it is not, strictly speaking, a term or condition of a tenancy that the landlord should have a right of distress. But is the landlord to have no right of distress in the case of a statutory tenant because that right is only an incident of the tenancy? It appears to me that that would be giving too narrow a meaning to the words "terms and conditions" as they are here used. But then comes the second question: Is that term or condition as I interpret it consistent with the provisions of the Act? When I look at the next sub-section I find that the "tenant retaining possession as aforesaid"—that is as a statutory tenant—"shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration, by any person other than the landlord"; that is, although he may bargain with his landlord as to the terms on which he shall give up possession, it is illegal for him to accept any valuable consideration for so doing from anybody else. That appears to me to be absolutely inconsistent with a right to assign. The assignee then seems to me to be in this difficulty; either the tenant has assigned to him for valuable consideration, which is illegal, and he

(1) *Doe* v. *Carter* 8 T. R. 57, 60.

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consequently gets no title, or else he has agreed to assign without consideration, and in that case, if the agreement is not embodied in a deed, the Court will not assist him to enforce it. A Court of law will not help him, because the agreement is not in a deed; and a Court of equity will not help him in the absence of consideration. Whether if an assignee produced a deed which showed no consideration on the face of it, and as to which it was proved that no consideration was in fact given, the Court would recognize the validity of the assignment is a question on which I am not now prepared to express an opinion. That is a question which I reserve. I also reserve the question whether the statutory tenant can sublet the whole or a part of the premises. That is obviously a question of the greatest practical importance, for there must be very many statutory tenants in different parts of the country who have in fact sublet portions of their premises. I also reserve the question of the statutory tenant's power of disposition by will. Sect. 12, sub-s. 1 (*g*) (1), shows that Parliament intended that if a statutory tenant died intestate his widow should have a right to continue his statutory tenancy, and it would be a strange thing if she were to be in a worse position where her husband expressly left her the premises by will than where he died intestate. But that is a matter to be dealt with when it arises. The two cases in which the position of the executor and the administrator of a deceased tenant have been considered were, as my Lord has pointed out, both cases in which the original tenancy had not been determined at the time of the death.

That then being the general position as regards the law, we have to consider its application to the facts of the two cases which are the subjects of these appeals. In the first case, *Keeves* v. *Dean*, the county court judge held that there was no power to assign, and therefore it became unnecessary

(1) By s. 12, sub-s. 1 (*g*): "The expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

for him to inquire whether there was an effective assignment or not. The terms of the assignment were not before him, nor were they before the Divisional Court. If there had been no statement before us as to the terms which the deed in fact contained it might have been proper to order a new trial to ascertain whether the assignment was without consideration or not; but as we have been given to understand that it was for valuable consideration, it is unnecessary to do so.

In the other case, *Nunn* v. *Pellegrini*, a document was produced which transferred the goodwill, fixtures, and stock in trade for a sum of money. But no document was produced which transferred the tenant's interest in the premises, and therefore the assignee was in the dilemma to which I have already referred; either he had got possession because he had promised to pay a sum of money for the goodwill and stock in trade, in which case the assignment would be for valuable consideration, or if he was let into possession without consideration he would have nothing to which the Courts would give effect. I cannot help feeling that it is an unfortunate result for two persons who appear to have paid considerable sums of money to get into these premises that they should have to be turned out, but we must interpret the Act without regard to the result, and leave them to such remedies as they have under the ordinary law of contract. For these reasons I agree that the appeals should be allowed.

LUSH J. I also am of opinion that the judgment of the Divisional Court cannot be supported. When it is said that a person who, perhaps inaccurately, is called a statutory tenant can assign one necessarily asks oneself what it is that he has got to assign. He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord. It is a very valuable right, but it is personal to him. The fact that the right is only personal is, I think, apart from s. 15, shown by the whole scheme of the Act and

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by s. 12, sub-s. 1 (*g*). That sub-section provides for the case of a statutory tenant who dies intestate, and allows his widow, if she was residing with him at the time of his death, to continue in possession of the house, and if there was no widow then a member of his family to be selected by the county court judge in default of agreement. That sub-section gives the position of statutory tenant to a particular defined person, the widow or selected member of the family, and it would seem strange that after the Legislature has defined the person who is to enjoy the protection of the statute that position of statutory tenant can be assigned to another. The difficulty in the way of the statutory tenant assigning which seems to me insuperable is that it is essential to the validity of an assignment that the assignee should have a right of entry. But the moment the assignor gives up possession his right of entry ceases, and the assignee cannot possibly claim a right which the assignor did not himself possess. The Divisional Court found the right of assignment in the provision of s. 15, sub-s. 1, that the tenant should be entitled to the benefit of all the terms and conditions of the original contract of tenancy, being of opinion that such a right was one of those terms and conditions. I cannot accept that view. I am unable to regard a right to assign a tenancy as one of the terms or conditions of the tenancy. I do not think that it can be said to be a term or condition of the contract of tenancy any more than a right to sell a chattel which a person has bought can be said to be a term or condition of the contract of purchase. The purchaser of a chattel gets his right to resell it, not from his vendor, but from the law of the land according to which, speaking generally, all property is alienable. I agree that the appeals should be allowed.

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Appeal allowed.

Solicitors for the appellant: *Peard & Son.*

Solicitors for the respondent: *Gibson & Weldon, for F. Gowen, Croydon.*

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Appeal allowed.

KEEVES *v.* DEAN. NUNN *v.* PELLEGRINI.

Solicitors for the appellant: *Morris & Bristow, for Bernard Pretty, Ipswich.*

Solicitors for the respondent: *Foyer, White, Borrett & Black, for Westhorp, Cobbold & Ward, Ipswich.*

J. F. C.
W. H. G.

In re A SOLICITOR.

1924 *March* 3.

Solicitor—Order of Committee suspending Solicitor from Practice—Jurisdiction of Court to stay Publication of Order pending Appeal—Solicitors Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 56), *s.* 7, *sub-s.* 2.

The Court has jurisdiction to direct a stay, pending appeal, of the publication in the London Gazette, required by s. 7, sub-s. 2, of the Solicitors Act, 1919, of the effect of an order made by the Committee of the Law Society suspending a solicitor from practice.

Wherever practicable, an application for such a stay should, in the first instance, be made to the Committee.

APPLICATION on behalf of a solicitor, against whom an order suspending him from practice for two years was made on February 29 by the Committee of the Law Society, for a stay of the publication in the London Gazette of the operative part of the order pending the hearing of an appeal to the Divisional Court. In the ordinary course the notice would be published in the Gazette for March 4.

Cartwright Sharp for the solicitor.

Hon. S. O. Henn Collins for the registrar. Sect. 7, sub-s. 2, of the Solicitors Act, 1919 (1), imposes an absolute obligation on the registrar to publish the notice forthwith, and the

(1) Solicitors Act, 1919, s. 7, sub-s. 2: "In the case of every order made by the Committee . . . . whereby any solicitor is ordered to be struck off the roll of solicitors or is suspended from practice, the Registrar shall forthwith upon the filing of such order cause a notice stating the effect of the operative part of such order to be published in the London Gazette."

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Court has no jurisdiction to grant the stay asked for. What authority there is under the former procedure when the Law Society merely reported cases investigated by them to the Divisional Court, which then made the order, is against the claim of the present application for a stay, for in Trevor's Solicitors Act, 1888, p. 180, appended to the report of a case in which the Divisional Court suspended a solicitor from practice, there is a note to the effect that the Court refused an application that the name of the solicitor should not be mentioned pending an appeal to the Court of Appeal.

Cartwright Sharp in reply. The Court has an inherent jurisdiction to grant the stay asked for. The procedure under s. 7, sub-s. 2, of the Solicitors Act, 1919, is analogous to that under r. 186 of the Bankruptcy Rules relating to the publication of the fact that a receiving order has been made, and the Court has frequently granted a stay of such publication pending an appeal. Irreparable mischief may be done if a stay is not granted.

[He cited *Polini* v. *Gray*. (1)]

AVORY J. It is to be regretted that, owing to the fact that notice of this application was only served this morning, the Law Society has not had an opportunity of fully considering the question of jurisdiction raised before us; but it is impossible for the Court to do justice in this matter without creating a precedent, which may or may not be followed in the future when further argument may be heard upon it. Assuming, as I think we are entitled to assume, that there is some ground for the appeal by the solicitor, the Court must have inherent jurisdiction to make such an order as will avert the possible mischief that must arise if the registrar proceeds, as provided by s. 7, sub-s. 2, of the Solicitors Act, 1919, to cause the order of the Committee to be published in the London Gazette forthwith. If the order is published, and in the ordinary course it would be published to-morrow, irreparable harm may be done to the appellant, and harm which cannot be remedied by any order that the Court may

(1) (1879) 12 Ch. D. 438, 446.

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make on the hearing of the appeal. Before stating our conclusion I desire to say that an application such as this ought, wherever possible, to be made in the first instance to the Committee of the Law Society that has made the order in question; but should the Committee refuse to stay execution, or to make any necessary order to prevent mischief being done in the meantime, the applicant can come to this Court. As we understand, the present applicant had no proper opportunity of making the application to the Committee, and in those circumstances we ought to direct the registrar to abstain from publishing notice of this particular order in the London Gazette until the hearing of the appeal. Steps will be taken to provide for an early hearing of the appeal.

HORRIDGE and SANKEY JJ. concurred.

Stay granted.

Solicitor for Law Society: *E. R. Cook.*

J. S. H.

[IN THE COURT OF APPEAL.]

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1923

Nov. 7.

B. LIPTON, LIMITED *v.* BELL.

[1922. B. 1129.]

Debtor and Creditor—Sale and Distribution of Assets—Written Authority—Deed of Arrangement—Assignment of Property—Deeds of Arrangement Act, 1914 (4 *& 5 Geo.* 5, *c.* 47), *s.* 1, *sub-ss.* 1 (*a*), 2 (*a*).

A letter signed by a debtor in the following form: "I hereby authorize you to realize my estate including stock in trade, book debts, furniture, and all other assets and to apply the proceeds first in payment of the costs, charges, and preferential claims, etc., and secondly to pay the balance to my creditors pro rata":—

Held, not to be an "assignment of property" within s. 1, sub-s. 2 (*a*), of the Deeds of Arrangement Act, 1914; and (any argument that it was a deed of arrangement within sub-s. 1 on other grounds being precluded).

Held, not to be a deed of arrangement within sub-s. 1.

In re Spackman (1890) 24 Q. B. D. 728 applied and followed.

In re Hughes [1893] 1 Q. B. 595 discussed.

APPEAL from the decision of a Divisional Court on appeal from the county court of Northumberland holden at Newcastle-upon-Tyne.

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B. LIPTON, LD. v. BELL.

The plaintiffs B. Lipton, Ld., having recovered judgment for 30*l.* and 7*l.* 2*s.* 6*d.* costs against Charles Walter Hayes and Mary Louisa Hayes his wife, obtained on November 29, 1922, a garnishee order attaching debts due from one G. J. Bell, and ordering the said G. J. Bell to attend on the application of the plaintiffs that he should pay the debts alleged to be due from him to Mrs. Hayes. On December 29 the District Registrar made an order dismissing the plaintiffs' application. On appeal from this order Bray J. allowed the appeal and directed an issue to be tried and referred to the District Registrar for directions.

On February 19, 1923, the District Registrar ordered that the plaintiffs and G. J. Bell should proceed to the trial of an issue in the county court and that the question should be whether on December 1, 1922, G. J. Bell, the defendant in the issue, was indebted to the said Mary Louisa Hayes in any and what sum.

The defendant was the secretary of the Northumberland and Durham Traders' Association, Ld., and carried on business in Newcastle-upon-Tyne. On August 21 Mrs. Hayes had written to him the following letter: "I hereby authorize you to realize my estate including stock in trade, book debts, furniture, and all other assets and to apply the proceeds first in payment of the costs, charges, and preferential claims, etc., and secondly to pay the balance to my creditors pro rata. This shall be your sufficient authority for so acting in the matter and I hereby agree to indemnify you. . . . ."

The defendant sent a copy of this letter to all the creditors. Out of thirty-seven creditors thirty-one were said to have assented to its terms. The sum realized under the authority conferred thereby amounted to 37*l.* 17*s.* 6*d.*, which the defendant claimed to retain as trustee for the creditors.

The issue was heard in the county court on March 14, 1923. The defendant contended that the 37*l.* 17*s.* 6*d.* was not a debt due from him to Mrs. Hayes. The plaintiffs contended that the letter of August 21, 1922, was a deed of arrangement within s. 1 of the Deeds of Arrangement Act,

1914 (1), being either an assignment of property within sub-s. 2 (*a*) or a letter of licence within sub-s. 2 (*d*), and not having been registered under the Act, was void by virtue of s. 2. The county court judge held that the letter was not a deed of arrangement within the Act and that there was no debt due from the defendant to Mrs. Hayes. He therefore gave judgment for the defendant.

The plaintiffs appealed to the Divisional Court. The Court (Darling and Salter JJ.) held that the letter of August 21 was an assignment of property within s. 1, sub-s. 2 (*a*), and, not having been registered, was void, with the result that the 37*l.* 17*s.* 6*d.* remained in the hands of the defendant to the use of Mrs. Hayes and was a debt due from him to her and immediately recoverable. The appeal was therefore allowed and the judgment of the county court judge was reversed and judgment was entered for the plaintiffs.

The defendant appealed.

(1) Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), s. 1, sub-s. 1: "A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal or not—

(*a*) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally;

(*b*) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors:

otherwise than in pursuance of the law for the time being in force relating to bankruptcy."

Sub-s. 2: "The classes of instrument hereinbefore referred to are—

(*a*) an assignment of property;

(*b*) a deed of or agreement for a composition;

and in cases where creditors of the debtor obtain any control over his property or business—

(*c*) a deed of inspectorship entered into for the purpose of carrying on or winding up a business;

(*d*) a letter of licence authorizing the debtor or any other person to manage, carry on, realise or dispose of a business with a view to the payment of debts; and

(*e*) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts.

Sect. 2: A deed of arrangement shall be void unless it is registered with the registrar of bills of sale under this Act within seven clear days after the first execution thereof by the debtor or any creditor. . . ."

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Lowenthal for the appellant. The Divisional Court were wrong in holding that the letter of August 21, 1922, was an assignment of property within s. 1, sub-s. 2 (*a*). A mandate is not an assignment: *In re Spackman* (1); *In re Hughes.* (2) It is true that those cases were decisions upon the meaning of "conveyance or assignment" in s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, which is now replaced by s. 1, sub-s. 1 (*a*), of the Bankruptcy Act, 1914; but the Bankruptcy Act and the Deeds of Arrangement Act, 1914, are in pari materia and the word "assignment" should bear the same meaning in both statutes. Neither can this letter be held to be a letter of licence within s. 1, sub-s. 2 (*d*), of the Deeds of Arrangement Act, because a letter of licence is only a deed of arrangement "in cases where creditors of the debtor obtain any control over his property or business," and there is no evidence of their having done so. If the letter was not a deed of arrangement on either of these, the only suggested grounds, it did not require registration and is a valid trust in favour of creditors, and irrevocable, having been assented to.

2. If the letter was an assignment of property, and so a deed of arrangement which has been avoided for want of registration, still so long as the proceeds of the property remain in the hands of the defendant with the consent of and without any demand by Mrs. Hayes, they are not a debt due by him to her: *Roberts* v. *Jones.* (3)

Hansell for the respondents. The letter was "an assignment of property" within s. 1, sub-s. 2 (*a*). Property includes money: s. 30, sub-s. 1, and Bankruptcy Act, 1914, s. 167; which is assigned by being handed over. An assignment need not be embodied in any particular form. An application for admission to membership of the Stock Exchange subject to the rules of the Stock Exchange coupled with a letter from the member informing the House that he is unable to comply with his bargains has been held to be an assignment: *In re Halstead.* (4) Assignment would include

(1) 24 Q. B. D. 728.
(2) [1893] 1 Q. B. 595.
(3) (1892) 61 L. J. (Q. B.) 523.
(4) [1917] 1 K. B. 695.

an equitable assignment. An equitable assignment "may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. . . . If the assignment be for valuable consideration and communicated to the third person it cannot be revoked by the creditor or safely disregarded by the debtor": *Brandt & Co.* v. *Dunlop Rubber Co.* (1) Therefore there was an assignment of the book debts at any rate. There was also an assignment of the proceeds of the sale of the stock in trade, furniture, and other assets. There was a mandate to the respondent to pay the proceeds to the creditors. Until this mandate was communicated to the creditors the respondent was merely an agent or attorney and the mandate was revocable by Mrs. Hayes; but when the respondent had pledged his word to the creditors to pay them according to the mandate, he became a trustee and the mandate became irrevocable: *Hodgson* v. *Anderson* (2); *Siggers* v. *Evans* (3); *Johns* v. *James* (4); *Ellis & Co.* v. *Cross.* (5) Such a transaction is to all intents and purposes an assignment. No doubt in *In re Spackman* (6) this Court held that a direction given to an auctioneer to sell furniture and hold the proceeds on behalf of creditors was not a "conveyance or assignment of property" within s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. But in *In re Hughes* (7) the Court, while declaring that the transaction in *In re Spackman* (6) could by no means be considered an assignment, yet in fact held that there could be, and had been in that case, an assignment of leaseholds by way of declaration of trust. In some cases the most convenient way of assigning property is by a declaration of trust; in others the most convenient way is that which

(1) [1905] A. C. 454, 462.
(2) (1825) 3 B. & C. 842.
(3) (1855) 5 E. & B. 367.
(4) (1878) 8 Ch. D. 744.
(5) [1915] 2 K. B. 654.
(6) 24 Q. B. D. 728.
(7) [1893] 1 Q. B. 595.

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was followed in this case. The assignment being void, the Divisional Court were right in holding that the money was a debt due from the respondent to Mrs. Hayes: *Stumore* v. *Campbell & Co.* (1); *In re Bagley* (2); *In re Lee.* (3)

Counsel also argued that the letter of August 21, 1922, was sufficient evidence of an agreement for a composition within s. 1, sub-s. 2 (*b*), and was a letter of licence authorizing the realization of a business within sub-s. 2 (*d*), but the Court held that in the circumstances these points could not be raised.

Counsel was not called upon in reply.

BANKES L.J. This is an appeal from the decision of a Divisional Court on appeal from the county court. The facts lie in a narrow compass and the amount involved is small, but the questions raised and discussed are of considerable importance.

A Mrs. Hayes was indebted to the respondent company who recovered judgment against her, and then sought to garnish moneys in the hands of a Mr. Bell which had come into his possession in pursuance of an authority given to him by Mrs. Hayes on August 21, 1922. The respondent company contended that this authority was void under the Deeds of Arrangement Act, 1914, and that consequently the money in Bell's hands was a debt due to Mrs. Hayes which could be garnished by them. The appellant Bell contended first that the authority did not come within the Deeds of Arrangement Act at all, and secondly that if it did and so was void, there was still no debt due from him to Mrs. Hayes immediately payable, because Mrs. Hayes had not demanded the return of the money. In my opinion the second contention fails. If the authority was avoided by the Deeds of Arrangement Act the money held by the appellant was immediately returnable to Mrs. Hayes without any demand. To hold otherwise would be to ignore the authorities which have been cited and to drive a coach and four

(1) [1892] 1 Q. B. 314. (2) [1911] 1 K. B. 317, 323.
(3) [1920] 2 K. B. 200.

through the Deeds of Arrangement Act. But that is not a point I intend to decide on this appeal.

The important point is whether the authority of August 21, 1922, is an instrument which is avoided by the Deeds of Arrangement Act, 1914. An instrument is avoided by the Act if made for one or other of the purposes or in respect of the matters referred to in s. 1, sub-s. 1 (*a*) or (*b*). Sub-s. 2 defines the classes of instruments referred to in sub-s. 1; and to come within the operation of the Act the instrument must not only conform to the definition in sub-s. 1 (*a*) and (*b*), but must fall within one of the classes mentioned in sub-s. 2. The first class mentioned is "assignment of property"; the second is "deed of or agreement for a composition," and then comes a class comprising deeds or documents or instruments "in cases where creditors of the debtor obtain any control over his property or business." I dismiss this last class on the ground that there was no evidence obtainable from the document that the creditors obtained any control over the property or business. The classes of instruments to be considered therefore are those under headings (*a*) and (*b*). With regard to those under (*b*) it might be urged with great force that this instrument was a deed of or agreement for a composition; but that point is not before the Court, because it was not raised before the county court judge, and so there is no appeal upon it.

The only point therefore left for consideration is whether this instrument is an assignment of property. First I wish to clear away most of the argument upon revocable mandates, for the question whether a mandate might in certain circumstances become irrevocable seems to me to have little bearing on the question whether an antecedent transaction affecting the subject matter of the mandate was or was not an assignment. When I come to the more relevant matters I find an indication of the rule to be applied to this case in *In re Spackman* (1) and *In re Hughes.* (2) In the former case Spackman had been adjudicated a bankrupt. He had retained a firm of solicitors for the purpose of effecting if possible an

(1) 24 Q. B. D. 728. (2) [1893] 1 Q. B. 595.

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arrangement with his creditors and had handed over to them a carriage, horses, and harness with authority to sell them and receive the proceeds, and he had charged the proceeds with the amount of the costs and expenses incurred by him under the retainer. The carriage, horses, etc., had been sold on November 25, 1886. The firm of solicitors had received the proceeds and claimed to retain them in respect of their charges under the retainer. Some of the items of their bill of costs were incurred before and some after November 22, 1886. The trustee in bankruptcy alleged that there had been an act of bankruptcy on November 22, 1886, of which the solicitors had knowledge and therefore could only retain so much of the proceeds as would cover their charges before that date. The bankrupt's available property besides the carriage, horses, etc., on November 22 consisted of household furniture, office furniture, and books. He had instructed an auctioneer to sell the furniture. On November 22 he gave written directions to the auctioneer to pay the proceeds of the sale into a bank in the names of the solicitors and the auctioneer who were to hold them on behalf of the creditors. On November 23 the furniture was sold and the proceeds were paid into the bank according to the instructions. The trustee in bankruptcy contended that there had been on November 22 an assignment of the whole, or substantially the whole, of the bankrupt's property for the benefit of his creditors generally within the meaning of s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, and therefore an act of bankruptcy. Lord Esher M.R. in giving judgment said (1): "The sole question is whether it"—the transaction on November 22—"is within sub-s. 1 (*a*). That sub-section relates to cases where the debtor makes 'a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.' What is the meaning of that language? I think it must be construed, having regard to the known meaning and acceptation of those phrases in bankruptcy law before the Act. I think there was a well-known meaning attached to the term 'assignment' in

(1) 24 Q. B. D. 738.

bankruptcy law, as used in relation to this subject. It applied to cases where a debtor had executed a deed which assigned all, or substantially all, his property to a trustee or trustees for the benefit of his creditors generally. If the phrase had a well-known meaning in bankruptcy law before the Act, I think it has that meaning in the section, and that meaning only. That being so, no declaration of trust or mere contract is an act of bankruptcy within the meaning of those words in the sub-section. There must be an assignment for the benefit of creditors according to the well established meaning of the phrase in bankruptcy law before the Act, viz., an assignment of the property by deed to a trustee for the benefit of creditors." The Master of the Rolls added: "It follows from what I have said that, whether this transaction amounted to a declaration of trust for the benefit of creditors, or a contract that the property should be dealt with in a certain way for their benefit, or whatever it was, unless it was an assignment of the whole, or substantially the whole, of the debtor's property for the benefit of creditors, it was not an act of bankruptcy. I do not think it was an assignment, and therefore there was no act of bankruptcy at the time when the solicitors received this money."

Fry L.J. said (1): "Then the question remains whether it was an assignment of the debtor's property to trustees for the benefit of creditors generally within sub-s. 1 (*a*)"—of the Bankruptcy Act, 1883, s. 4. "I think that the language of sub-s. 1 (*a*) and sub-s. 1 (*b*) respectively must be contrasted in order to arrive at the meaning of the words 'conveyance or assignment' in the former. Sub-s. 1 (*a*) speaks of 'conveyance or assignment.' Sub-s. 1 (*b*) speaks of 'conveyance, gift, delivery, or transfer.' Having regard to the language so used, it seems clear to me that the Legislature must have had in their minds the fact that there are other modes of disposition, by which property may be rendered subject to be applied for the benefit of creditors, besides a conveyance or assignment in the proper sense of those terms. The debtor himself might declare himself to be a trustee of his

(1) 24 Q. B. D. 740.

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property for the benefit of creditors. Such a mode of disposing of property is well known to the law; but it is not an assignment in the proper sense of the term. Again, property may be dealt with in various other modes, e.g., by agreement to assign, by payment, or by delivery. All these are modes of disposition by which property may be dealt with for the benefit of creditors, but which are not properly assignments; yet we find that the Legislature, which uses the expressions, 'gift, delivery, or transfer,' in sub-s. 1 (*b*), only uses the expressions 'conveyance or assignment' in sub-s. 1 (*a*)." The Lord Justice concludes his judgment in this way (1): he says that "Sub-s. 1 (*a*) was not intended to deal with the various other dispositions of the debtor's property which might be made for the benefit of his creditors."

In my opinion Fry L.J.'s reading of s. 4 of the Bankruptcy Act, 1883, may well be applied to s. 1 of the Deeds of Arrangement Act, 1914. There also the Legislature enumerates various methods of dealing with property other than assignments, and when assignments are named among them I think an assignment properly so called, whether legal or equitable, is intended.

It is said that this language has been modified by the more recent case of *In re Hughes*. (2) In my view that case really confirms *Spackman's Case*. (3) No doubt it explains that some of the language in *Spackman's Case* (3) would be inapplicable where the only practicable method of assignment is by way of a declaration of trust, where for example it is sought to assign leasehold property charged with onerous covenants where no trustee for creditors could be found to accept an assignment. In *Hughes's Case* (2) the debtor granted and conveyed to trustees all his freeholds and copyholds and all other his hereditaments except leaseholds upon the trusts declared of his personal estate, and he assigned to the trustees all his stock in trade, goods, chattels, wares, merchandise, household furniture . . . . book debts, sums of money, etc., with all other his personal estate except

(1) 24 Q. B. D. 741. (2) [1893] 1 Q. B. 595.
(3) 24 Q. B. D. 728.

leaseholds to hold upon the trusts declared, which were, shortly, to convert into money and out of the proceeds pay the expenses of the sale and then all claims entitled in priority in bankruptcy, and to divide the residue among all the creditors. And then it was provided that the debtor should stand possessed of all his leaseholds in trust for and to convey the same as the trustees should direct. It was contended on the authority of *Spackman's Case* (1) that this deed was not a conveyance or assignment because it included a declaration of trust. Lindley L.J. was evidently of opinion that *Spackman's Case* (1) was rightly decided. After holding without doubt that the deed was a conveyance or assignment, he said (2): "But then it is said that *In re Spackman* (1) is inconsistent with this view. I cannot so regard it. In that case there was nothing whatever which, by any stretch of imagination, could be regarded as a conveyance or an assignment in any sense whatever. An attempt was made to spell out of some correspondence a trust for creditors, and the Court held that, if there was enough to create such a trust, yet there was no such conveyance or assignment as was contemplated by s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. The Court was not considering the meaning of conveyance or assignment as applied to leasehold property, and although there were some observations to the effect that a mere declaration of trust is not a conveyance or assignment within the meaning of the enactment in question, I cannot think that those observations were intended to apply, or ought to be treated as applying, to a formal conveyance or assignment by a debtor of all his property, except leaseholds, to trustees for the benefit of his creditors, and a covenant or declaration of trust by which his leaseholds are to be held and disposed of for their benefit also. The decision itself was, in my opinion, quite right; but to decide that this deed is not an act of bankruptcy, and to hold that *In re Spackman* (1) compels the Court so to decide, would, in my opinion, be quite wrong." The Lord Justice so expressed himself after having called attention to a declaration of trust as being the usual means

(1) 24 Q. B. D. 728. (2) [1893] 1 Q. B. 601.

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by which conveyancers effect an assignment of onerous property.

These authorities should guide the Court in construing this particular document, to which I desire to confine myself. It is quite short; it is signed by Mrs. Hayes, and it says: "I hereby authorize you to realize my estate including stock in trade, book debts, furniture and all other assets"—so far it is only an authority to realize those assets—"and to apply the proceeds first in payment of costs, charges, and preferential claims, etc., and secondly to pay the balance to my creditors pro rata. . . . ." In my opinion this document amounts to no more than an authority to realize the lady's property coupled with a declaration of trust for the application of the proceeds. I do not find in its terms any of the essential elements of an assignment properly so called, that is of that form of transfer which the law recognizes as an assignment or cessio bonorum as it is called in one of the cases cited to us. (1) The appeal must be allowed, and the judgment of the Divisional Court set aside.

SCRUTTON L.J. This case comes before the Court in an unsatisfactory way. It began as a garnishee issue in the county court to determine whether a sum of 30*l.* was a debt due to Mrs. Hayes from the person who received it from her to distribute among her creditors, so that it could be garnished by a creditor of Mrs. Hayes, or whether the person who had received it was entitled to hold it. As the case originated in the county court we are bound by the findings of fact in that court and we cannot hear points of law argued in this Court which were not taken in the county court and which would require findings of fact in that court.

The question is whether a document given by a trader to a person described in the evidence as the secretary of the Trade Protection Society, authorizing that person to realize the trader's estate, apply the proceeds in satisfaction of preferential claims and pay the balance to creditors pro rata,

(1) *In re Halstead* [1917] 1 K. B. 695, 701, using a phrase borrowed in *Tomkins* v. *Saffery* (1877) 3 App. Cas. 213, 216, from the Roman law.

followed by a circular from that person to the creditors asking for their assent to the arrangement, is a deed of arrangement within the Act of 1914. To come within that Act a document need not be a deed; it need not be under seal.

How this case might have been decided if the point could have been and had been raised that, a number of creditors having assented to the arrangement, the document was an agreement for a composition, within s. 1, sub-s. 2 (*b*), I express no opinion. The point was not taken in the county court and no facts were found from which an agreement could be inferred.

It was argued that the document fell within sub-s. 2 (*d*) or (*e*), which only apply where creditors of the debtor obtain any control over the property or business. Here again there was no evidence from which we can say in what relation the creditors and the secretary to the Trade Protection Society stood to the business or property of the debtor, and whatever suspicion may be entertained we cannot draw the inference that they had obtained any control over one or the other. That leaves the last point—namely, that this document coupled with the subsequent circular constituted an assignment of property within sub-s. 2 (*a*).

But for *In re Spackman* (1) and *In re Hughes* (2) I should have desired to consider this matter more fully; but in *Spackman's Case* (1), where in closely similar circumstances a trader gave a mandate to realize his property and hold the proceeds for the benefit of his creditors, the Court held that this was not an assignment for the benefit of creditors within s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. I recognize the fact that two members of the Court gave expression to obiter dicta in wide terms which one of them afterwards qualified in *In re Hughes*. (2) Nevertheless in that case Lindley L.J., who with Lopes L.J. was diminishing the distance between mandates and assignments, said that in *Spackman's Case* (1) "there was nothing whatever which, by any stretch of imagination, could be regarded as . . . . an assignment in any

(1) 24 Q. B. D. 728. (2) [1893] 1 Q. B. 595.

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sense whatever." I take an assignment of property to be something different from employing an agent to sell property and pay the proceeds to others. That is a mandate and not an assignment; and I feel myself bound by the authorities to hold that the transaction in this case, which is almost identical with the transaction in *Spackman's Case* (1), is not an assignment of property within the Deeds of Arrangement Act, 1914. I should clearly be bound to hold that it is not an act of bankruptcy within s. 1 of the Bankruptcy Act, 1914, and bearing in mind the close relation which deeds of arrangement bear to bankruptcy, it would be most unfortunate if this Court were to put different meanings on the word "assignment" in the Bankruptcy Act and in the Deeds of Arrangement Act. Therefore I think the county court judge came to the right conclusion. The appeal must be allowed, though I do not regard the conclusion as very satisfactory.

ATKIN L.J. I agree; and as this case comes from a county court, so that we are bound by the facts found there and restricted to the points of law taken there, our decision is not likely to have the far reaching consequences with which we are threatened. As regards the question whether there was an agreement for a composition within sub-s. 2 (*b*) I am satisfied that the respondent in this Court was precluded from taking that point in the Divisional Court and has therefore lost nothing by not doing so.

Upon the other points I have little to add to the judgments already delivered. The letter of authority in *Spackman's Case* (1) is for practical purposes indistinguishable from the letter in this case. In *Spackman's Case* (1) the document was held not to be an assignment. In *Hughes's Case* (2) Lindley L.J. said that there was in *Spackman's Case* (1) "nothing whatever which, by any stretch of imagination, could be regarded as a conveyance or assignment in any sense whatever." After that we could not treat the document in this case as conveyance or assignment under the Bankruptcy Act. I agree that there is no reason for giving to

(1) 24 Q. B. D. 728. (2) [1893] 1 Q. B. 595.

"assignment" in the Deeds of Arrangement Act a meaning different from the meaning of the same word in the Bankruptcy Act. The two Acts are closely allied. Throughout the Deeds of Arrangement Act there are references to the Bankruptcy Act and the rules made under that Act and to jurisdiction and proceedings in bankruptcy, and s. 24 of the Deeds of Arrangement Act seems to assume that a deed of arrangement under that Act would be a conveyance or assignment under the Bankruptcy Act. It follows that we cannot hold the letter of August to be an assignment within s. 1, sub-s. 2 (*a*).

Upon the question whether it was a letter of licence within sub-s. 2 (*d*) we have no evidence that the creditors obtained any control over the property or business of the debtor, whether that means antecedent control or control obtained by the letter of licence which is impeached. In the result the appeal must be allowed and the issue sent to the county court must be determined in favour of Mr. Bell.

Appeal allowed.

Solicitors for appellant: *King, Wigg & Brightman, for H. E. Richardson & Elder, Newcastle-upon-Tyne.*

Solicitors for respondent: *Woolfe & Woolfe, for L. Woolfe, Newcastle-upon-Tyne.*

W. H. G.

C. A.

1923
Nov. 19, 21;
Dec. 14.

[IN THE COURT OF APPEAL.]

ANSTRUTHER-GOUGH-CALTHORPE *v.* McOSCAR AND ANOTHER.

[1920. A. 782.]

Landlord and Tenant—Lease—Covenant to repair—"Well and sufficiently repair"—Breach—Long Lease—Alteration in District—Change in Character of Tenants—Measure of Damages—Requirements of Tenants at Commencement of Term.

A lease of three newly erected houses made in 1825 for a term of ninety-five years contained a covenant by the lessee in very wide terms, the effect of which was, put shortly, that he would during the term well and sufficiently repair the premises with all manner of necessary reparations and would yield up at the end of the term the said premises so being in all things well and sufficiently repaired.

At the end of the term the assignee of the reversion brought an action against the assignees of the lease for breach of the above covenant. By an order of the Court the assessment of the damages was referred to an arbitrator. At the beginning of the term the houses were country houses; at the end of the term the only tenants likely to occupy the houses or parts of them would be tenants on short terms. The arbitrator assessed the damages at two alternative sums. He computed the smaller sum on the basis that the defendants were liable to execute such repairs only as in view of the age, character, and locality of the premises would make them reasonably fit to satisfy the requirements of reasonably minded tenants of the class that would then be likely to occupy them. He found that tenants of this class would require only such repairs as would keep out wind and water:—

Held, by Bankes, Scrutton and Atkin L.JJ. that this was not the proper measure of liability; but that the defendants were liable for the cost of doing all necessary acts well and sufficiently to repair the premises in the words of the covenant, that is to say, for the cost of putting them into that state of repair in which they would be found if they had been managed by a reasonably minded owner, having regard—

Per Bankes L.J., to their age;

Per Scrutton and Atkin L.JJ., to their character and ordinary uses, or the requirements of tenants of the class likely to take them, at the time of the demise or at the commencement of the term.

Morgan v. *Hardy* (1886) 17 Q. B. D. 770; (1887) 35 W. R. 588 followed.

Proudfoot v. *Hart* (1890) 25 Q. B. D. 42 distinguished.

Judgment of McCardie J. [1923] 2 K. B. 573 reversed.

APPEAL from the decision of McCardie J., reported sub nom. *Calthorpe* v. *McOscar* (1), on a special case stated by an arbitrator.

(1) [1923] 2 K. B. 573.

The special case recited the following facts:—

By a repairing covenant contained in a lease under seal from the Right Honourable George Lord Calthorpe to one Nathaniel Stallwood dated March 2, 1825, of three messuages and premises therein described and now known as Nos. 17, 19, and 21 Calthorpe Street, Gray's Inn, in the county of Middlesex for the term of ninety-five years from June 24, 1824, the said Nathaniel Stallwood covenanted that he his executors administrators or assigns should and would at his or their own proper costs and charges from time to time and as often as occasion should require during the said term well and sufficiently repair support uphold maintain paint pave empty scour cleanse amend and keep the said three several messuages and buildings thereby demised and all such other buildings as should during the said term thereby granted be erected upon the said ground and premises thereby demised and all the walls fences pavements vaults cellars sinks privies sewers drains water-courses and other appurtenances belonging or to belong thereto in by and with all and all manner of needful and necessary reparations and amendments whatsoever and the said messuages buildings and premises with their appurtenances so being in all things well and sufficiently repaired supported upheld maintained painted paved emptied scoured cleansed amended and kept as aforesaid at the end or sooner determination of the said term thereby granted should and would peaceably and quietly leave surrender and yield up unto the said George Lord Calthorpe and his assigns or other the person or persons for the time being entitled as aforesaid together with all marble and other chimney pieces mantles jambs and slabs hearths and covings sash and other window casements shutters doors locks keys and other fastenings whatsoever water-closets and cisterns and things thereunto belonging and all wainscots linings partitions and finishings whatsoever and all closets cupboards dressers shelves presses drawers pumps pipes posts pales and rails and other fixtures fixed or fastened to the said messuages buildings and premises or which should be found thereon

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or any part thereof during the last seven years of the same term.

The successor in title of the said George Lord Calthorpe is and was at the time of the determination of the said lease the Honourable Rachel Anstruther-Gough-Calthorpe hereinafter called the plaintiff.

On May 21, 1920, the plaintiff brought an action in the King's Bench Division of the High Court of Justice against one Laura McOscar as defendant to recover damages for breach of the said covenant.

The case went on to recite that one Annie Fordham was added as defendant, and that an amended statement of claim, a defence by the defendant Annie Fordham and an amended and reamended defence by the defendant Laura McOscar had been delivered, and continued to recite as follows :—

On August 4, 1922, by an order of the Court made in the action it was by consent ordered that the amount of damages for which final judgment was to be signed should be ascertained by a named arbitrator. By a further order dated November 3, 1922, it was by consent ordered that Arthur Frederick Brown of 11 Little College Street in the City of Westminster should be appointed as arbitrator in the place of the first-named arbitrator to assess the amount of the damages, and that the plaintiff should be at liberty to sign final judgment for the amount so ascertained.

At the hearing of the arbitration on December 5 and 12, 1922, it was agreed between the parties that one Charles Robert Davies should with his consent, which was duly given, be substituted as defendant for the said Annie Fordham.

The arbitrator having taken upon himself the burden of the reference and having viewed the said houses and heard and examined the allegations and evidence of the parties made his award concerning the matters referred to him as in the case set forth subject to the opinion of the Court upon the questions of law therein mentioned.

The case stated as follows :—

It was not disputed that the measure of damages to be recovered by the plaintiff for breaches of the said covenant to repair was the cost of the repairs rendered necessary when the term ended in June, 1919, by reason of the defendants not having performed the said covenant, but the parties differed as to the nature and extent of the repairs that were necessary for the due performance of the covenant. The defendants contended that the effect of the covenant was limited to the extent of imposing an obligation to carry out such repairs only as having regard to the age, character, and locality of the premises would make them reasonably fit to satisfy the requirements of reasonably minded tenants of the class that would be likely to occupy them, and that the cost of the work necessary for that purpose was the measure of damages. The plaintiff contended that the true effect of the covenant was to render the defendants responsible to do all needful and necessary acts well and sufficiently to repair, etc., the premises in the words of the covenant without limitation to such repairs as would satisfy the requirements of reasonably minded persons of the class likely to become occupiers of the premises.

I find as a fact that the tenants likely to occupy the premises would only take the houses separately or only part of a house for short terms, on weekly, monthly, or quarterly tenancies, and would not accept any repairing obligations, and that the requirements of reasonably minded tenants of this class would not include many repairs which in my opinion were needful and necessary for the repair and maintenance of the property.

If the plaintiff's contention is correct, then, making due allowance for the age of the premises and the change in the residential character of the locality brought about in the century that has elapsed since the lease was granted, I estimate the cost of the repairs which were needful and necessary at 586*l.*, and I assess the damages at that sum.

If the defendants' contention is correct I estimate the cost of the repairs at 220*l.*, and assess the damages at that sum.

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I award no damages for loss of rent during the period of repair.

The question for the opinion of the Court is which of the said contentions is correct.

McCardie J. decided in favour of the defendants' contention. The plaintiff appealed.

During the hearing before the Court of Appeal the Court desired to know how the difference between the two sums 586*l.* and 220*l.* was arrived at, and asked the arbitrator to furnish information on this point. In reply the arbitrator sent to the Court a schedule of dilapidations upon which he based the larger sum, indicating which items were in whole or in part excluded in computing the lower sum. He added a statement of the principle on which he assessed the alternative sums. This statement is set out in full in the judgment of Bankes L.J.

Topham K.C., *C. G. O. Bridgeman* and *F. Hinde* for the appellant. McCardie J. applied a wrong principle when he measured the liability on a repairing covenant by the requires ments of tenants who would be likely to take the demised premises at the end of the lease. It would be more true to say that the lessee's liability is measured with reference to the beginning of the lease than with reference to its end. This case is really covered by *Morgan* v. *Hardy* (1), which was affirmed on this point by the Court of Appeal (2), though reversed on another. (3) The decision of the Court of Appeal was not cited in the Court below.

[EVE J. referred to *In re London Corporation.* (4)]

The learned judge based his judgment on *Proudfoot* v. *Hart* (5), which, he said, "supplies a useful working rule for the normal covenants to repair, however variously they may be worded." The rule is that "good tenantable repair is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the

(1) 17 Q. B. D. 770.
(2) 35 W. R. 588.
(3) (1887) 18 Q. B. D. 646.
(4) [1910] 2 Ch. 314.
(5) 25 Q. B. D. 42.

occupation of a reasonably-minded tenant of the class who would be likely to take it." (1) That may be a useful working rule where the tenancy is a short one, for example for three years, as it was in *Proudfoot* v. *Hart* (2); for then the class of tenants who would be likely to take the house would be practically the same class throughout the tenancy. But when the tenancy is for ninety-five years, the class of tenants who would be likely to take the house at the beginning of the tenancy and the class likely to take it at the end of the tenancy may and often do differ widely, as they have done in the present case; and the question at issue now—namely, which class is to be regarded—was not raised in *Proudfoot* v. *Hart*. (2) It is submitted that the class of tenants whose requirements furnish the standard of reparation is the class likely to take the house at the beginning of the tenancy. These were three new houses in 1824. The lease was a builder's lease. The builder covenanted to keep the houses in repair and deliver them as so repaired. The covenant can have no meaning but that the houses are to be kept in that state of repair in which they were at the commencement of the lease. Lord Esher M.R. delivered the leading judgment in *Morgan* v. *Hardy*. (3) It is not likely that he intended three years later in *Proudfoot* v. *Hart* (2) to retract his former opinion. That opinion, moreover, has the support of the House of Lords in *Conquest* v. *Ebbetts*. (4)

W. Banks for the respondents. There are two classes of cases which are liable to be confused and which ought to be kept separate and distinct: the one relates to the measure of damages for breach of covenant; the other relates to the construction of the covenant. *Morgan* v. *Hardy* (5) belongs to the first class. *Proudfoot* v. *Hart* (2) and the present case belong to the second class. Therefore *Morgan* v. *Hardy* (5) was not referred to in *Proudfoot* v. *Hart*. (2) Neither were *Rawlings* v. *Morgan* (6) nor *Joyner* v. *Weeks* (7),

(1) 25 Q. B. D. 52.
(2) 25 Q. B. D. 42.
(3) 35 W. R. 588.
(4) [1896] A. C. 490.
(5) 17 Q. B. D. 770; 18 Q. B. D. 646; 35 W. R. 588.
(6) (1865) 18 C. B. (N. S.) 776.
(7) [1891] 2 Q. B. 31.

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for the same reason. Where the measure of damages is the matter in dispute the use to which the tenement is intended to be put does not come in question; but it is most material where the construction of the covenant is in issue. To repair a thing means to restore it to a safe and stable condition, so that it is fit to be used for the purpose for which it was intended. A dwelling house is repaired when it is fit to be used as a dwelling house by persons who are going to live in it.

[ATKIN L.J. At the beginning or at the end of the lease?]

At the time when the question is raised upon the true construction of the covenant. *Proudfoot* v. *Hart* (1), relied on by McCardie J., was assumed to be good law in *Lurcott* v. *Wakely*. (2) The fanciful requirements of an owner are not to be insisted upon: *Cooke* v. *Cholmondeley*. (3)

[*Doe* v. *Jones* (4) and *Soward* v. *Leggatt* (5) were also cited.]

Counsel were not called upon to reply.

Cur. adv. vult.

Dec. 14. The following written judgments were delivered:—

BANKES L.J. The question in reference to which this appeal is brought came before McCardie J. upon a special case stated by an arbitrator to whom the question of damages had been referred in an action by a landlord against a tenant for breaches of a covenant to repair. The covenant is contained in a lease dated March 2, 1825, for a term of ninety-five years from June 24, 1824, of three houses known as 17, 19 and 21 Calthorpe Street, Gray's Inn Road. The covenant is expressed in an extended form to "well and sufficiently repair support uphold maintain paint pave empty scour cleanse amend and keep the three several messuages and buildings . . . . with all and all manner of needful and necessary reparations and amendments whatsoever" and to yield them up at the end of the term well and sufficiently repaired, supported, etc., as aforesaid. I attach no importance to the particular form of words used in the covenant. The

(1) 25 Q. B. D. 42.
(2) [1911] 1 K. B. 905.
(3) (1858) 4 Drew. 326.
(4) (1832) 4 B. & Ad. 126.
(5) (1836) 7 C. & P. 613.

effect is the same in my opinion whatever words the parties use, provided they plainly express the intention that the premises are to be repaired, kept in repair, and yielded up in repair. In the present case the covenant was one in reference to newly erected buildings, and the question therefore does not arise, which in some cases is very material, of the effect of a covenant to repair when at the time the covenant is entered into the buildings to which it applies are old and dilapidated. Considerations which arise in such a case were discussed in *Lurcott* v. *Wakely*. (1) They do not arise here. The question which does arise here is stated by the arbitrator in the special case as follows: [The Lord Justice read the statement of the case as set out above, after the recitals, beginning at the words "It was not disputed," and continued:]

McCardie J. decided in favour of the defendants' contention. He discussed at length a number of the reported cases dealing with questions of breaches of covenant to repair, and at the conclusion of his judgment he expressed the view that the decision in *Proudfoot* v. *Hart* (2) supplies a useful working rule for the normal covenants to repair, however variously they may be worded. With all respect to the learned judge I cannot agree with this view. No case, in my opinion, has been more misunderstood, or more frequently misapplied, than *Proudfoot* v. *Hart* (2), as I think the further information supplied in the present case well illustrates. When the appeal came before this Court it was felt that without some further explanation from the arbitrator of the difference between the two sets of figures it was really impossible to answer the questions in the special case satisfactorily. The Court therefore asked the arbitrator to supplement the case with further information of the process by which he arrived at the two sets of figures, and in reply he furnished the Court with a schedule of dilapidations and with a very clear and enlightening statement which demonstrates better than anything else could do how misleading a test of the obligation under a covenant to repair the supposed

(1) [1911] 1 K. B. 905. (2) 25 Q. B. D. 42.

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wants of an intending tenant at the expiration of a long term of years may be. I cannot do better than quote the last four pages of the arbitrator's report. He says: "The principal difference between the figures arises in the items of outside and structural repair. I was in considerable doubt whether anything under these items should be included in the lower figure, as the class of tenant which I considered likely to occupy the houses would be very unlikely to require repairs of this class to be done, which was the contention of the defendants. My reason for including in my second estimate any amounts in respect of such repairs at all is that the local authorities have powers to require such works to be done to houses occupied by the working classes where want of them is likely to endanger health and where they may therefore be considered to act as the tenants' agents, but the amounts I did include are comparatively small—e.g., I only allowed for pointing in small quantities where the brickwork was particularly bad, or damp had already appeared in the rooms. The brickwork of a house may be very bad and yet the renewal of the pointing needful and necessary for the maintenance of the structure, so that it may be expected to last for its normal life if properly kept in repair, may be deferred for many years before the house becomes 'untenantable,' or before the need of it would be even noticed by a tenant who had no repairing liability. The differences in the amounts allowed for inside repairs are also due to the difference between the quantity of such repairs as I thought necessary for the maintenance of the property and keeping it in a fair average state of cleanliness, and the quantity which I thought a tenant would require on his own account or the local authority might require for him.

"To summarise: (1.) The higher sum in my award is my estimate of the cost of doing all needful and necessary acts well and sufficiently to repair, etc., the premises in the words of the covenant, which I took generally to mean the cost of putting the premises—

"(*a*) into such condition as I should have expected to find them in had they been managed by a reasonably

minded owner, having full regard to the age of the buildings, the locality, the class of tenant likely to occupy them, and the maintenance of the property in such a way that only an average amount of annual repair would be necessary in the future; or

" (*b*) in such state of repair as would satisfy the requirements of reasonably minded persons who would be prepared to take on lease the houses either singly or as a block upon similar repairing covenants to those contained in the expired lease and on such conditions as to rent as would presume the premises being put at the commencement of the term free of expense to the lessee in such a state of good and sufficient repair as would render only an average amount of annual expenditure necessary during the term.

" (2.) The lower sum is my estimate of the cost of such repairs as would satisfy the literal requirements of reasonably minded tenants of the class now likely to occupy the premises who would not accept any repairing obligations, with such additions as would be necessary to avoid the receipt of notices from the local authorities. Such repairs would not include many repairs necessary for the maintenance of the structures in accordance with (1.) (*a*) and (*b*) above, the neglect of which, however, would not (i) interfere with the immediate comfort of the occupiers and so come within their requirements, or (ii) cause danger to health and so come within the purview of the local authorities."

Now that the Court has the further facts before it, it appears that the class of tenant at the present time likely to occupy these houses is content so long as the rain does not penetrate the walls or the sanitary inspector does not interfere on the ground that a nuisance exists on the premises, and that in the lower figure arrived at by the arbitrator he has, acting upon the defendant's contention as to the rule laid down in *Proudfoot* v. *Hart* (1), allowed only such items of repair as will

(1) 25 Q. B. D. 42.

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satisfy this class of tenant. It seems impossible that any Court can have laid down a rule which requires so extraordinary a construction to be placed upon the covenant in the present case. If the rule contended for by the defendants exists it must apply to cases where the status of the house to be repaired has appreciated as well as to cases where it has depreciated, and it must descend to such depths of degradation as to meet the case where what had at the commencement of the tenancy been a high-class residence is at the end of the tenancy occupied in tenements by a class of tenants who look upon an outer door or an area gate as an unnecessary obstruction, and who therefore require neither the one nor the other. If the rule in *Proudfoot* v. *Hart* (1) is of universal application it would have to be applied in such a case as that just mentioned, and apparently also even although the condition of things at the end of the tenancy had been largely, if not entirely, brought about by a failure to perform the covenant to repair. In my opinion the case of *Proudfoot* v. *Hart* (1) lays down no rule of general application. The language used by the Lords Justices is quite appropriate to the facts of that case and must, I think, be read as applicable to those facts and to similar facts only. To extend it, as was done by the learned judge in the Court below and as has been done in many other cases, is not only, in my opinion, to misapply it, but to put the decision into conflict with a previous decision of the Court of Appeal to which Lord Esher himself was a party. The decision to which I refer is that of *Morgan* v. *Hardy*. (2) In that case the contention between the parties was in substance the same as that between the parties in the present case. In a reasoned judgment Denman J. rejected the defendant's contention. The case went to the Court of Appeal, and curiously the report in the Law Reports (3) makes no reference to the decision of the Court on this point, and the report is confined to the decision of the Court reversing the judgment of Denman J. on the other

(1) 25 Q. B. D. 42.

(2) 17 Q. B. D. 770; in C. A. 18 Q. B. D. 646; 35 W. R. 588.

(3) 18 Q. B. D. 646; affirmed nom. *Hardy* v. *Fothergill*, 13 App. Cas. 351.

part of the case. What really occurred appears in the report in the Weekly Reporter (1), where both points are reported separately. On the first point counsel opened the appeal by repeating their argument, that the proper measure of damages for breach of the covenant to repair is proportionate to the value of the house at the time the breach occurs. The report suggests that this argument at a very early stage was met by an almost contemptuous interruption on the part of the Master of the Rolls in which the other members of the Court concurred. He is reported as saying: "As far as I understand this contention it is that the fact that a neighbourhood has deteriorated ought to decrease the measure of damages for a breach of a covenant to leave in repair. I think that such a proposition is wholly untenable, and that every case is to the exact contrary. The appeal therefore must be dismissed." After this the argument proceeded on the other ground. The decision thus arrived at confirmed the judgment of Denman J. on this point, and is clearly in accordance with general principles. In construing the covenant in the present case, or any other covenant, it is material to see what the subject matter was which the parties had in their contemplation when the covenant was entered into: see per Willes J. in *Heffield* v. *Meadows*. (2) Here there is no doubt as to the subject matter. It was the three houses described in the lease, and the obligation undertaken was the repair of those houses. How can the extent of such an obligation be measured by the requirements of the class of tenants who happen to be occupying the premises ninety-five years afterwards? *Proudfoot* v. *Hart* (3) did not, in my opinion, lay down any such rule. When the facts of that case are looked into it is manifest that the Lords Justices who decided the case had no such question in their minds. What they were dealing with, and all they were dealing with, was a three years' agreement for a tenancy, in which case the class of tenants at the end of the tenancy was, in their view, no doubt the same class as the class of tenants at the commencement.

(1) 35 W. R. 588.

(2) (1869) L. R. 4 C. P. 595, 599.

(3) 25 Q. B. D. 42.

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Upon that assumption, and upon that assumption only, is the rule laid down by Lopes L.J. and accepted by the Master of the Rolls, in my opinion, explicable or intelligible. The arbitrator in the present case has rendered a real service by laying down so clearly the lines on which he proceeded. In his mind apparently heads (*a*) and (*b*) of cl. 1 of that portion of the report in which he summarizes the position mean the same thing, or at any rate lead to the same result. To most people head (*a*) will, I think, prove the more useful guide; and provided the age of the buildings is regarded as the dominant feature, and the locality and class of tenant is only taken into account in relation to, or as a consequence of, the age of the buildings, then I consider the rule laid down by the arbitrator a good working rule of general application. Had it been applied to the facts in *Proudfoot* v. *Hart* (1) it would have produced the same result as the rule framed by Lopes L.J. for those facts. Not to apply that rule to the facts of the present case is, I think, to make an entirely new contract for the parties and to substitute a different standard of obligation for the one to which the parties did agree. In my opinion the answer to the arbitrator's question is that the plaintiff's contention is correct. The appeal therefore succeeds.

SCRUTTON L.J. This appeal raises a question of principle of some general importance on the construction of repairing covenants. The lease was for ninety-five years from 1824, of houses in the Gray's Inn Road which had just been built by the lessee under a building agreement. It expired at Midsummer, 1919. The repairing covenant was a very long one, but it may be shortened for the purposes of this case to a covenant "during the term to well and sufficiently repair with all manner of necessary reparations and to yield up at the end of the term the premises so being in all things well and sufficiently repaired." The question of the amount of damages for breach of this covenant was referred to an arbitrator, who stated a special case and supplementary

(1) 25 Q. B. D. 42.

case as to the principles on which he acted. I refer to the case and supplementary explanation for the full definition of the alternative principles contended for. Shortly, the landlord contended for the cost of all repairs necessary to put the premises into the condition in which a reasonable owner would keep them having regard to their age, locality, continued maintenance and probable tenants; while the tenant contended that at the end of the term only short-term tenants would live in the house, and that he was only liable for the cost of such repairs as such tenants would want, or the local authorities would require. The tenant relied on the decision of this Court in *Proudfoot* v. *Hart* (1); the landlord mainly on the decision of this Court in *Morgan* v. *Hardy*. (2) McCardie J. decided in favour of the tenant's contention; the landlord appeals to this Court.

The judge below appears to have read or had cited to him an enormous number of cases, and we allowed a few to be cited to us. In my view the matter can be dealt with as if the covenant were one to "keep and yield up at the end of the term in repair." I do not think there is any substantial difference in construction between "repair," which must mean "repair reasonably or properly" and "keep in good repair," or "sufficient repair" or "tenantable repair," or most of the various phrases cited to us. There is an analysis of the meaning of "repair" by Buckley L.J. in *Lurcott* v. *Wakely* (3), with which, as far as it goes, I agree. The tenant must when necessary restore by reparation or renewal of subsidiary parts the subject matter demised to a condition in which it is reasonably fit for the purposes for which such a subject matter would ordinarily be used. The question in dispute seems to be whether, as the purposes for which such a subject matter is ordinarily used may vary from time to time, the standard of repair is to vary from time to time, or remains as it was when the subject matter was demised. For instance, where a fashionable mansion let for a long term of years has fallen to the position of a tenement house for the poorer classes,

(1) 25 Q. B. D. 42. (2) 17 Q. B. D. 770; 35 W. R. 588.
(3) [1911] 1 K. B. 905, 923.

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is the standard of repair to become less onerous than when the house is let? To take an illustration of Bankes L.J., if the sub-tenants of a tenement house do not want a front door, is the tenant to be excused from keeping a properly repaired front door on the premises?

In my view this question has been decided, as far as this Court is concerned, by the decision in *Morgan* v. *Hardy*. (1) In that case the referee had to decide between the claim that the premises must be properly repaired and the contention that, as the premises and the neighbourhood had deteriorated, and in consequence of such deterioration a great portion of the repairs required "were not suited to the said premises and were unnecessary for their use and enjoyment" (2), they need not be considered in awarding damages. This Court, affirming Denman J., said very summarily that it was a wholly untenable proposition to say that the depreciation of the neighbourhood ought to lower the amount of damages for breach of a covenant to repair. This can only mean that the fact that the class of persons who would use the house at the end of the term had deteriorated, so that their requirements in the way of repairs were less, was immaterial in ascertaining the repairs that the tenant was bound to execute. *Morgan* v. *Hardy* (1) was the case of a fifty years' lease.

In *Proudfoot* v. *Hart* (3) the lease was for three years only, and the covenant was to keep in good tenantable repair. There was no suggestion of any change in character of the house or its probable tenants between the beginning and the end of the term. Lopes L.J. framed a definition which Lord Esher adopted as follows (4): "Such repair, as having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." I do not think there was any intention of suggesting that a deterioration in the class of tenants would lower the standard of repairs; the point was not before the Court, and had been decided the other way by the Court four years previously.

(1) 17 Q. B. D. 770; 35 W. R. 588.
(2) 17 Q. B. D. 777.
(3) 25 Q. B. D. 42.
(4) 25 Q. B. D. 55.

Therefore in my view we are bound to look to the character of the house and its ordinary uses at the time of the demise. It must then be put in repair and kept in repair. An improvement of its tenants or its neighbourhood will not increase the standard of repair, nor will their deterioration lower that standard. It follows in this case that the principle put forward by the tenant was erroneous, and that the statement by the arbitrator in 1 (*a*) of the supplementary case is accurate, but must be limited to conditions at the time of the demise. The arbitrator has told us how he has applied the two principles, but these are questions of fact with which we cannot interfere. I would only say that on the question of age in buildings, guidance will be found in the judgments in *Lurcott* v. *Wakely* (1), care being taken to distinguish between partial repairs and complete reconstruction, as in *Lister* v. *Lane*. (2) In my view the appeal should be allowed and judgment entered for the plaintiff in accordance with the directions of the award.

ATKIN L.J. In this case the ultimate question is the construction of a repairing covenant entered into in the year 1825 in a lease for the term of ninety-five years from June 24 of houses then lately built situate in Calthorpe Street, Gray's Inn Road. The term has expired, and the immediate question before us arises upon a case stated by an arbitrator, a surveyor, appointed by the parties under an order for reference made in an action for breach of the covenant. It is unnecessary to read the words of the covenant. I see no reason for construing the words of covenants in leases dealing with obligations to repair in any other way than one would construe any other covenant. Effect should be given if possible to every word used by the parties : see per Fletcher Moulton L.J. in *Lurcott* v. *Wakely*. (3) It does not appear to me useful to refer to such covenants as the usual covenants to repair, or general repairing covenants, and then consider only what is the meaning of "repair." It appears to me still less useful

(1) [1911] 1 K. B. 905. (2) [1893] 2 Q. B. 212.
(3) [1911] 1 K. B. 905, 915.

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to take a number of terms which may be found in different leases, treat them all as synonymous, and so impute to all of them a special meaning attached by authority to one of them. In the present case the learned judge, after finding that there is no difference between repair, good, substantial, thorough, habitable and tenantable repair, fixes on the word "tenantable," finds that it has been construed in a three years' agreement as "such repair as . . . . would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it," and construes the covenant in question by that standard, though the word "tenantable" is nowhere to be found in it. By an extension of the construction of "tenantable," as laid down in *Proudfoot* v. *Hart* (1), he finds that "the class of tenant who would be likely to take it" must be ascertained as of the date at which the premises are to be yielded up; and having a finding of the arbitrator that the only tenants who would now be likely to take a house in the particular situation would be tenants of tenements for short terms, he fixes the measure of damages by the repairs which such tenants would be likely reasonably to require; which, as now explained by the arbitrator, seems to be no more than is sufficient to keep the wind and water out. To apply such a test to a repairing covenant taken upon a ninety-five years' term seems to me to expose both landlord and tenant to possibilities of the most astonishing variation of obligation and rights. The obligation is a continuing obligation, and therefore would presumably vary with the requirements of the hypothetical possible tenant during each moment of the tenancy. The neighbourhood might deteriorate, or it might appreciate, or it might during the term several times alternate between the two extremes. In this decade it might be lettable as a dwelling house, in that only for a shop, or in the next for a factory. It is, I think, sufficient for us to say that this view of construction has been rejected by a decision of the Court of Appeal in *Morgan* v. *Hardy*. (2) The contention between the plaintiff and defendant, as appears from

(1) 25 Q. B. D. 42. (2) 17 Q. B. D. 770; in C. A. 35 W. R. 588.

the report below, was precisely that taken by the defendants in the present case. It was rejected by Denman J., and in the Court of Appeal the judgment is as follows: "Lord Esher M.R.: As far as I understand this contention it is that the fact that a neighbourhood has deteriorated ought to decrease the measure of damages for a breach of a covenant to leave in repair. I think that such a proposition is wholly untenable, and that every case is to the exact contrary. The appeal therefore must be dismissed." Bowen and Fry L.JJ. concurred. It is unfortunate that the report of this case in the Court of Appeal was not brought to the attention of the learned judge, for it would have inevitably affected his decision, being binding on him as it is on us.

For my own part I should be very reluctant to introduce into covenants in leases considerations of fitness for a particular purpose which cause much difficulty in contracts of a different kind. Unguided I should have thought that the original and proper sense of "tenantable" was fit to be tenanted, that is, occupied, and that the word meant no more than, if it meant as much as, "habitable." But *Proudfoot* v. *Hart* (1) binds me to hold that in a three years' agreement it has reference to the reasonable requirements of a tenant of the class who would be likely to take it. Accepting that construction I have no doubt that the requirements of such a tenant are deemed to continue the same during the term, or if not, are to be estimated by the requirements of such a tenant as would be likely to take the premises at the commencement of the term.

Once one is extricated from the clutch of the hypothetical tenant I do not think there is much difficulty in construing the covenant in this case to "well and sufficiently repair . . . . maintain . . . . paint, pave . . . . amend and keep" the premises "in by and with all and all manner of needful and necessary reparations and amendments whatsoever, and . . . . so . . . . amended and kept . . . . yield up." There is a very full discussion of what is meant by "repair" in the judgments of Fletcher Moulton and Buckley L.JJ. in

(1) 25 Q. B. D. 42.

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Lurcott v. *Wakely* (1) with which I respectfully concur. Repair is not confined to houses; it applies to chattels, and it connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole. Time must be taken into account; an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken. Speaking generally, I have not seen a better statement of the duties of a tenant under such a covenant as this than the statement in the present case by the arbitrator of the principles on which he proceeded in arriving at the higher sum, which has been read by my Lord. It is true that he refers to the class of tenant likely to occupy them as being one of the matters a prudent owner would have regard to, but I gather from the whole report that he does not regard this consideration as involving a fluctuating standard. I would myself prefer to eliminate the possible tenant, and would be content with the arbitrator's earlier test when he is dealing with the pointing as being "needful and necessary for the maintenance of the structure so that it may be expected to last for its normal life if properly kept in repair." I think that in arriving at the higher figure the arbitrator has taken a correct view of the law, and that judgment should be entered for the plaintiff for that sum.

Appeal allowed.

Solicitors for appellant: *Walters & Co.*

Solicitor for respondents: *Ingledew, Davies, Sanders & Brown, for Davies, Sanders & Swanwick, Chesterfield.*

(1) [1911] 1 K. B. 905.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1924
Feb. 20, 21.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* GRIFFITH.

Licensing—"Licensed premises"—Grant of Licence in respect of Part of a Building—Validity of—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *ss.* 15, 70, 81.

Licensing justices, purporting to act under the Licensing (Consolidation) Act, 1910, granted to the manager of a large building used as a general emporium a licence to sell intoxicating liquors by retail for consumption on or off the premises in a certain defined space intended to be used as a restaurant situate on one of the upper floors of the building.

Held, affirming the decision of the Divisional Court, that notwithstanding that there was direct internal communication between the restaurant and all other parts of the building, the justices had jurisdiction to grant the licence.

APPEAL from the decision of a Divisional Court on a case stated by the confirming authority of the County of London, reported [1924] 1 K. B. 163.

At a licensing meeting held at Kensington in the County of London on February 27, 1923, the licensing justices for the Kensington Division granted to the respondent "a justices' licence authorising him to hold an excise licence to sell by retail at the licensed premises situated at the refreshment rooms forming the fourth floor at Nos. 13 to 35 Hans Road, Kensington, and other the premises connected therewith known as Harrods' Georgian Restaurant any intoxicating liquor which may be sold under a publican's licence for consumption either on or off the premises." The owners of the premises in respect of which the licence was granted were therein stated to be Messrs. Harrods, Ld., and it was provided that the licence should be in force for two and a quarter years, subject to the conditions indorsed thereon. Among the conditions so indorsed was the following: 5. "The monopoly value to be 500*l.* payable in two instalments on October 1 in each year." The licence was confirmed by the confirming authority on April 30, 1923, but at the request of the appellants a case was stated for the opinion of the

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High Court. The case, so far as was material to the discussion before the Court of Appeal, stated as follows :—

" 1. The above-named respondent is the secretary of Harrods, Ld. (hereinafter called ' the said Company '), who carry on a retail business at their premises at Brompton Road, Hans Road, Basil Street and Hans Crescent in the parish of Kensington in the said County of London. The premises comprise a large block of buildings all under one roof or roofs, and access can be obtained from any part of Harrods' premises to any other part without the necessity of going into the public street.

" 2. The said premises consist of a basement, ground floor and four other floors, and contain numerous departments where a large variety of goods and commodities are sold.

" 3. On the fourth floor of the said premises there is a restaurant for the use of the public, and access to the said restaurant can only be obtained by lifts or by staircases from the said floors as follows : (1.) by a staircase in the middle of the building at the north-east corner of the restaurant commencing on the first floor and communicating on the second and third floors with the public departments on these floors and giving access to the restaurant. This staircase can be approached from the street only by going through one or other of the public departments of Harrods' Stores ; (2.) by lifts in two parts of the restaurant which communicate with the ground floor and all intermediate floors and again can be approached from the street only by going through one or other of the public departments of the Stores ; (3.) by a staircase giving access direct from Hans Road—this staircase runs from the ground up to the restaurant on the fourth floor. On the ground floor and on each intermediate floor there is access to this staircase by doors from the various public departments, but it is not necessary actually to pass through any of the departments of the Stores to obtain access to the restaurant from Hans Road by means of this staircase ; (4.) by an emergency exit staircase leading from the restaurant directly down into Hans Road and again communicating on each of the intermediate floors and on

the ground floor with the public departments on these floors. This staircase is kept solely as an emergency exit, and is not actually used either by the public or the staff. No part of the fourth floor other than that occupied by the restaurant is open to the public.

"4. There is no structural separation between the said restaurant and the remainder of the premises occupied by Messrs. Harrods and used by them for their general business.

"5. The departmental manager, Mr. Miln, is on behalf of the said company licensed to sell wine and spirits for consumption 'off' the premises in wholesale or retail quantities. The 'off' licence department to which the public have access consists of two counters with storage space under and at the back of the counters on the ground floor close to the corner of Brompton Road and Hans Road.

. . . . . .

"10. On January 5, 1923, the respondent ntending to comply with the requirements of s. 15, sub-s. 1 (*b*), of the Licensing Act, 1910, caused a notice of his intended application for the grant of the justices' licence above mentioned to be affixed to the door at the bottom of the above mentioned staircase (3.) leading direct from the restaurant into Hans Road.

. . . . . .

"12. The said sum of 500*l.* was fixed by the said licensing justices and by the said confirming authority on the assumption that the said licence covered the restaurant only, and did not include any sum in respect of the sale by retail of intoxicating liquors for consumption off the premises.

"Should it be held that the said licence cannot lawfully be granted for the said restaurant only, but would have to be granted for the whole of the said premises subject to restrictions as to the parts where and the conditions on which the sales would take place, the sum payable for monopoly value would be largely in excess of this amount.

"13. The appellants, who appeared before the confirming authority, contended that they could not lawfully confirm the said new licence on the ground that it was not lawful

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for the licensing justices to grant a licence covering the restaurant only; and if any licence were granted to the respondent the whole of the said premises of Harrods' Stores should be included in the said licence and the monopoly value increased accordingly.

"The authority decided to make an order confirming the new licence subject to the opinion of the High Court upon the question of law, whether on the facts above stated the new licence could lawfully be granted by the licensing justices in the said form."

The Divisional Court (Lord Hewart C.J., Sankey and Salter JJ.) held that the Licensing (Consolidation) Act, 1910, s. 70, did not interfere with the power of the justices to grant a licence to premises with such internal communication, although the owner was not entitled to use it; and that the decision of the justices as to the monopoly value was correct. (1)

The Commissioners of Customs and Excise appealed.

Sir H. Slesser S.-G., *Bowstead* and *Enness* for the appellants. Licensing justices have no power to grant a licence in respect of a part of a building.

There is no suggestion in the Act that "the premises" in respect of which the licence is to be granted include anything less than an entire house. On the contrary, there are numerous sections which treat the word "premises" as convertible

(1) By s. 14, sub-s. 1, of the Licensing (Consolidation) Act, 1910: "The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions . . . . as they think proper in the interests of the public; subject as follows: (*a*) Such conditions shall in any case be attached as . . . . the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed and the value of the same premises if they were not licensed."

By s. 110. "The expression 'justices' on-licence' means a justices' licence for the sale of any intoxicating liquor for consumption on the premises."

The contention that the monopoly value of the licence would be increased by the extension of the licence to the whole of the building was not pressed before the Court of Appeal.

with "house." Thus s. 37, which deals with the qualification of the premises for a justices' on-licence, provides that "premises shall not be qualified .... unless *the house* contains" certain rooms for the accommodation of the public. Sect. 33, sub-s. 1, authorizes a person interested in "premises about to be constructed or in course of construction for the purpose of being used *as a house* for the sale of intoxicating liquors" to apply for a provisional licence, and sub-s. 3 provides that "where a notice is required to be put up *on the door of a house*" —evidently referring to s. 15, sub-s. 1 (*b*)—the notice may be put up in a conspicuous position on any part of the premises, in the absence of a door to put it on. Sect. 37 having required that the premises shall be of a certain annual value, s. 39 says that "no land shall be included in such premises other than" the garden and curtilage "used by the persons residing in and frequenting the house."

Then s. 70 (1), which prohibits the use of any internal communication between licensed premises and non-licensed premises used for public resort, affords a strong argument to show that a licence cannot lawfully be granted in respect of such premises as the restaurant in the present case, for it is in direct internal communication with the various departments of the Stores, and is intended to remain so. The Court below said that the licence might be granted, notwithstanding the existence of the internal communication, "there being an obligation that the licensee shall not make use of it." That would seem to be impracticable unless those communications were closed, in which event the licence would lose the greater part of its value. But if the justices have no power to grant a licence in respect of part of a building, still less have they power to do

(1) By s. 70, sub-s. 1: "A person shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises, not being licensed premises, which are used for public entertainment or resort, or as a refreshment house."

Sub-s. 2: "If any person acts in contravention of this section, he shall be liable to a fine not exceeding ten pounds for every day during which the communication remains open, and in addition shall, if he is the holder of a justices' licence, forfeit that licence."

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so where that part is on an upper floor. By s. 15, sub-s. 1 (*b*) (1), the applicant for a new licence must exhibit a notice of his intended application "on the door of the premises." That imports that the door must adjoin the street, the object of putting it on the door being to enable passers-by in the street to see it, which they would not do if the notice were put on the door of a room on an upper floor. Here the notice was put not on the door of the licensed restaurant, but on the door of the staircase, which was not licensed. Again by s. 81 the police are empowered "at all times to enter on any licensed premises" to prevent infringements of the Act. (2) But it would be impracticable for the police to do that if in order to enter on the licensed premises they would have to pass over intervening non-licensed premises over which they had no right to go. And the same difficulty would arise in connection with the discharge by excise officers of their duty, under the Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 22, to enter any place, used for the purpose of carrying on a trade or business subject to the excise laws, for the purpose of taking accounts and charging the proper duty of excise.

Sir Henry Curtis Bennett K.C. and *St. John Hutchinson* for the respondent. There is no objection to justices granting a licence in respect of a part of a building. Although the question of the legality of such a grant is now raised for the first time, it has for many years past been the practice to grant such licences. In the City of London there have long been numerous licensed restaurants, which are situated on upper floors of buildings, and are approached by common stairs; but no suggestion has even been made hitherto that their licences were improperly granted. In the present

(1) By s. 15, sub-s. 1: "A person applying for a new justices' licence must—(*b*) within twenty-eight days before the application is made cause notice of his application to be affixed and maintained between the hours of ten in the morning and five in the afternoon, of two consecutive Sundays, on the door of the premises."

(2) By s. 81, sub-s. 1: "Any constable may, for the purpose of preventing or detecting the violation of any of the provisions of this Act which it is his duty to enforce, at all times enter on any licensed premises."

case this question was at the outset raised with the object of increasing the monopoly value. Whether, even if the appellants' contention were well founded and the respondent's licence could only be legally granted in respect of the whole of these Stores, that would have the effect of swelling the monopoly value, may well be doubted, but it is not a question which it is now material to consider. Sect. 83 of the Act of 1910 expressly contemplates that part of a building may be licensed. It provides that: "No meeting of justices in petty or special sessions shall be held . . . . in any room, whether licensed or not, in any building licensed for the sale of intoxicating liquors." In *Stringer* v. *Huddersfield Justices* (1) it was held that justices were entitled to insert in a licence a condition that a particular specified room in the house should not form part of the licensed premises. The prohibition against internal communications with licensed premises in s. 70 creates no such difficulty as is supposed. It is directed to the use of communications made after the licence has been granted. It is taken from s. 45 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), which imposed a penalty on keepers of cookshops making internal communication with an adjoining public-house. It was aimed at secret and fraudulent communications, and was never intended to apply to a perfectly open communication of the existence of which the justices were well aware at the time of the application for the licence. This must be the interpretation which the authorities have always put upon the section, for no objection has ever been taken on the score of internal communications in the cases of the City restaurants already referred to. The police are always present when a new licence is applied for, and if they took exception to any existing communication it would be open to the justices to refuse the licence. Again the supposed difficulty under s. 81 is not real. If the intervening non-licensed premises between the street and the licensed restaurant are a place which is "used for public resort"—and the appellants have to contend they are so for the purpose of s. 70—the police have as much right to

(1) (1876) 40 J. P. 22.

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go there as the rest of the public. With regard to the difficulty of complying with the requirements of s. 15 as to the posting of a notice on the door of the licensed premises, it is enough to say that it is a sufficient compliance if the notice be placed on the street door at the bottom of the staircase leading direct to the restaurant, as was done here. It is not material that the staircase itself was not part of the licensed premises. If it were not so all the above mentioned upstair restaurants in the City would be open to the same objection.

Sir H. Slesser S.-G. in reply. It is not disputed that a licence could be granted to a portion of a building constituting a self-contained house, provided it had a separate access to the street, but here the licensed premises consist merely of a number of rooms not structurally separated from the rest of the building. If a licence can be granted to rooms of that description merely because their area is defined on a plan, it is difficult to see why it should not be granted to a defined portion of a room. It may be that if there was only one staircase leading to the restaurant and it led to nothing else, and all the other accesses to the restaurant were shut off, the premises would satisfy the requirements of the Act, including s. 15, and then they would do so because the staircase would be part of the licensed area.

BANKES L.J. This is an appeal upon a case stated by justices, and it undoubtedly raises an important question under the licensing laws, which does not seem to have come before the Courts on any previous occasion for direct decision. The question is whether licensing justices can lawfully grant an on-licence in respect of a defined part of a building such as Messrs. Harrods' Stores, which part is in direct internal communication with all the other parts of the building, the whole building being in the occupation of the person applying for the licence. The only question that we have to decide is a pure question of law upon the construction of the statute; with the general policy of the Legislature in reference to such a question we have nothing to do. Though, as I have said,

the matter is of considerable theoretical importance, it is, in my opinion, of but little practical importance, for I am satisfied that no licensing justices would for one moment entertain an application for a licence in respect of a part of a building unless the circumstances were very exceptional. I much doubt whether the Legislature ever contemplated the grant of a licence in respect of a separate part of a building, such as that with which we have to deal in the present case. But that is not the question. The question is whether on the true interpretation of the statute it has forbidden the granting of such a licence; and the contention of the appellants is that a consideration of the language of the statute as a whole, and of the safeguards imposed by it to prevent abuse of its provisions, shows that it was intended to forbid it. The Act provides for the granting of licences to persons in respect of defined premises. Sect. 9 empowers the justices to grant licences to such persons as they may think fit and proper, but by sub-s. 1 (*a*) of s. 15, if the application is for a new licence the applicant must deposit with the clerk of the licensing justices "a plan of the premises in respect of which the application is to be made." In this particular case the application was in respect of a defined part of Messrs. Harrods' premises, which is situate on the fourth floor, and which, with a room on the fifth floor immediately communicating with it, is known by the name of the Georgian Restaurant, and was for a licence to sell by retail in that restaurant any intoxicating liquor which may be sold under a publican's licence for consumption on or off the premises. The justices granted the licence, to which they attached certain conditions, amongst which was a condition that the monopoly value of the licence was to be 500*l.* payable in two annual instalments. It appears that the question of the justices' right to grant this licence originally arose in connection with the subject of monopoly value, a matter which is entirely foreign to the present inquiry. The question which has been argued before us is whether such a licence is opposed to the general provisions of the statute and whether it is within the justices' jurisdiction to grant it. In support of that view our

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attention has particularly been called to the following sections: s. 15, sub-s. 1, requires that the applicant for a new licence shall cause notice of his application to be affixed and maintained on the door of the premises on two consecutive Sundays before the application, and it was urged that if a licence can be granted in respect of premises on an upper floor of a building it would be impossible for a notice fixed on the door of such premises to satisfy the requirements of the section. Here the notice was apparently fixed on the door at the bottom of the stairs leading from the restaurant to the street, and that door was not the door of the licensed premises. But no point was taken before the justices as to the insufficiency of the notice, and the only question which we have to decide is whether in the absence of such an objection they had a discretion to grant the licence. Had the point been taken I should feel inclined to hold that no licence could lawfully be granted in respect of premises which were in such a position that a notice posted on the door of those premises would necessarily fail to realize the object of the section. But it is not necessary now to decide that. The next section is s. 70, which prohibits a person from making or using any internal communication between licensed premises and non-licensed premises which are used for public resort. That section, though not copied from, is suggested by a section in the Metropolitan Police Act, 1839, which was introduced to prohibit keepers of cookshops from making internal communication with an adjoining public-house. In the present section the prohibition is transposed, and it is said that, as the non-licensed portion of Messrs. Harrods' Stores is clearly a place of public resort, if this licence is allowed to stand Messrs. Harrods will daily commit an offence against the statute by allowing communication from the restaurant with the unlicensed portions of the building. Personally I think that the section does prohibit the use of a communication existing at the time of the licence granted, as well as one subsequently made, and therefore Messrs. Harrods would be technically guilty of an offence by allowing it; but at the same time I think that though nominally rendering the

offenders liable to prosecution it would be practically inoperative, for I cannot conceive that if the communication was known to the licensing justices at the time of the grant its subsequent use could possibly be followed by anything more than a nominal penalty, in view of the fact that there is nothing in the statute directly prohibiting the grant of such a licence. Then it was said that s. 81, sub-s. 1, by authorizing the police at all times to enter any licensed premises for the purpose of preventing infringements of the Act, implies that the licensed premises must immediately adjoin the street, so that there may be no intervening non-licensed premises over which the police would have no authority to pass. But while recognizing the importance of police supervision of licensed premises, I do not think that the difficulty suggested applies to the justices' jurisdiction to grant the licence, but is rather a matter which they should take into consideration in particular cases when debating whether they should exercise their discretion in favour of granting or refusing it. The conclusion which I have come to is that, if the statute is looked at as a whole, there does not appear to be any indication that the Legislature forbade the granting of such a licence as this, and therefore I think that the Divisional Court was right; but I venture to repeat what I said at the beginning of my judgment, that the matter is of very little practical importance, for it is only in extremely exceptional circumstances that the application for such a licence as this would have the faintest chance of success.

The appeal must be dismissed.

SCRUTTON L.J. In the form in which this appeal comes before us it raises a question of considerable general importance, which is not quite the same question as that which was considered in the Court below. The licensing justices have granted a licence for the sale of intoxicating liquors at certain defined premises intended to be used as a restaurant situate on the fourth and fifth floors of a large block of buildings known as Harrods' Stores, and the confirming authority have stated a case for the opinion of the Court in which they ask the question whether they could lawfully grant the licence

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in respect of the restaurant only, or whether they ought to have granted it in respect of the whole building, with the consequence (as they suggest) that the monopoly value would be increased accordingly. Both at the licensing sessions and in the Divisional Court great stress was laid on the question of monopoly value, because it appeared that Messrs. Harrods had already got an off-licence in respect of another part of their building, which it was suggested ought to be taken into account in arriving at the monopoly value of the new licence. Subsequently however the appellants became aware that the matter involved a much more serious question than that of the pecuniary value of the licence—namely, whether the Legislature had not, in the interests of public order, prohibited altogether the granting of a licence to a portion only of a building. Accordingly the Solicitor-General has abstained from arguing any question relating to monopoly value or the effect of the existing off-licence in another part of the building and has confined his argument to the contention that the justices have no power to grant a licence to a part of a building where there is internal communication between the part so licensed and the other parts of the building. Now whether the justices have power to grant such a licence, quite apart from the question whether in their discretion they should do so, seems to me to turn on the meaning of the word "premises" in the Licensing Act. Sect. 9 says that a licence may be granted to a person, but it is clear that the licence is not merely a personal licence; it is a licence to a person to sell in a defined locality. Sect. 15 speaks of that locality as "the premises in respect of which the application is to be made." Sect. 37 says that "the premises shall not be qualified to receive a justices' licence unless" they comply with certain requirements. The word "premises" is singularly vague. In conveyances it is often used to refer to the parcels already mentioned. In rating Acts it frequently includes land with no buildings on it. And I do not find anything in the Licensing Act which limits the word "premises" to an entire building. In my opinion any part of a building which is defined by metes and bounds is "premises" in respect of

which a licence can be granted, provided it is in the justices' opinion structurally adapted for the sale of liquor. I can quite understand that the justices will be slow to grant a licence to a part of a large building such as this, because of the difficulty of effective police supervision where the building has several exits and entrances which cannot all be watched during prohibited hours. But it appears to me that that is a matter which affects the discretion of the justices rather than their jurisdiction. It is a matter of common knowledge that there are in the City of London many cases of a floor of a building being occupied as a restaurant, and in some instances having more than one communication with the rest of the building, and approached by a common staircase or passage which is used in common with the occupants of the other parts of the building. And such restaurants have long enjoyed a licence without objection. Apart from that question of general suitability for police control, which, as I have said, appears to be rather a matter for the discretion of the justices, the only two objections that are really raised are in connection with the difficulty of putting an effective notice upon the door of such premises, and with the application of s. 70 to a part of a building. With regard to putting a notice on the door of the licensed premises in such a case as this I see no difficulty. There is a staircase leading direct from the street to the restaurant. It is true that if you go up that common staircase you may at various points diverge into other parts of Harrods' Stores, but nevertheless I think that the door into the street at the foot of the staircase is sufficiently the door of the licensed premises for the purpose of the notice. A more difficult question arises upon s. 70. My Lord has expressed one view of its meaning. At present I take a different view of it, though I do not bind myself to hold that view when the matter is further argued on a case directly raising the question. It provides that a person "shall not make or use or allow to be made or used any internal communication between any licensed premises and any premises not being licensed premises which are used for public entertainment or resort." As at

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present advised I think that applies to an internal communication which has come into existence after the granting of the licence. The words "make or allow to be made" clearly refer to a communication made since the date of the licence, and in my view the words "use or allow to be used" refer to a communication so made. I see considerable difficulty in the way of a construction which makes the section refer to communications in existence at the date of the licence. When this question arises I conceive that it will require a very strong case to induce the justices to grant a licence to a part of a building which has internal communication with the other parts, and that they will consider, in every case, as a matter of grave importance, the possibility of proper police control. It seems to me that that is a matter for the discretion of the justices when considering whether they shall grant the licence, and not a ground of prohibition against the licence being granted. For these reasons I think that the objections to the grant of this licence fail, and that the appeal should be dismissed.

SARGANT L.J. I am of the same opinion. The question raised on this appeal is, What is the meaning of the word "premises" when used in the Licensing Act to indicate the place in respect of which a licence to sell intoxicating liquors may be granted? The Solicitor-General in his argument started by assuming that prima facie it refers not merely to a building only, but to an entire house. He called attention to certain provisions in the Act which he said supported that meaning. In my judgment the word "premises" has no such prima facie meaning. It is as wide a term as can be used, and applies to any kind of hereditament. It is used in respect of open spaces; it is even used in respect of easements. And I cannot attach any general meaning to it which necessarily involves the notion of a building, still less of an entire building. I think that, apart from the particular sections to which I am about to refer, the word "premises" in this Act means some definite place ascertained by metes and bounds, in respect of which the licence is to be granted. Are there any sections which suggest that the meaning of the

word must be more limited? We have been referred to s. 15. But, with great respect to my Lord, I do not attach quite so much importance to the inferences to be derived from the requirement that a notice is to be placed on the door of the licensed premises as he does. No doubt that provision originated at a time when the only licensed premises were ordinary houses, but I think that the difficulty of finding a door to which the notice can be attached can be got over practically in the cases as they arise, and in this particular case, as Scrutton L.J. has pointed out, there is no real difficulty at all. Then there is s. 37, the provisions of which are undoubtedly more applicable to premises which are a house than to premises which are not. But then again the section is one which no doubt owes its present form to the fact that originally the premises in respect of which licences were granted were houses; and I do not think that the mere existence of a phrase of that kind is to be regarded as necessarily limiting the class of premises in respect of which licences may be granted. Then comes s. 70, on which the argument mainly turned. With regard to that section I am inclined to put the interpretation upon it which has been provisionally put upon it by Scrutton L.J. It appears to me that the way in which the phrase runs, "make or use" instead of "use or make," rather points to this, that the making comes first and the using afterwards, and the internal communication which is there referred to is a communication which is made after the grant of a licence, or which is used when made after the grant of a licence, rather than a communication existing at the date of the licence. If it had been intended to refer to existing communications as well as future, the phrase would have run "shall not use or make." It seems to me that the section tends in favour of the respondent's contention, assuming that the true interpretation is that which I have indicated, for it gets rid of the whole argument founded on the improbability that the Legislature would allow a licence to be granted in respect of premises the user of which would immediately involve the commission of an offence. On the other hand, if the true interpretation is that suggested

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by my Lord, the answer to the objection of the appellants may be that of Sankey J. when delivering the judgment of the Divisional Court: "The using of such a place may refer to using a place which was there either before or after the granting of the licence, there being an obligation, if there is such a place, that the licensee shall not make use of it. This indicates that the licensing justices have power to grant a licence to premises with such an internal communication as aforesaid." So that in my judgment that second interpretation is as much in favour of the respondent as the first.

Speaking generally I think that the absence of definition of what is meant by "premises" is not really any considerable objection to the respondent's contention, because it is not as if there were no discretion in the justices. They have the opportunity of considering the whole circumstances of the case, they have a definite plan put before them, they have the advantage of the presence of the police, who can raise objections to any internal communications that they may think objectionable, and therefore there is a practical safeguard against the risk of a licence granted in respect of a part of a building being abused. I think moreover that the fact of this Act being a Consolidation Act should be taken into account. For many years before 1910 there had been in existence licences, enjoyed by places more or less resembling the present, such as the restaurants in the City of London which have been referred to, places which were not houses in the sense for which the Solicitor-General contended, although possibly they may have been houses for the purpose of the Franchise Acts. It seems to me, in view of that fact, that when a Consolidation Act was passed in 1910, it can hardly be supposed, in the absence of express language to that effect, that the Legislature intended to render invalid a class of licences which had been treated as valid for many years.

Appeal dismissed.

Solicitor for the appellants: *Solicitor of Customs and Excise.*
Solicitors for the respondent: *Martineau & Reid.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1923
Oct. 30.

ADAMS *v.* MORGAN AND COMPANY, LIMITED.

[1922. A. 2562.]

Principal and Agent—Contract of Agency—Contract to indemnify—Sale of Business—Limited Company—Vendor continuing Business—Super Tax.

Where the seller of a business carries it on between the date of the contract and the date of completion on the buyer's account under a clause of the contract expressly entitling him to indemnity, the fact that the buyer is a corporation does not disentitle him to indemnity for super tax in respect of the business so carried on.

Judgment of McCardie J. [1923] 2 K. B. 234 affirmed.

APPEAL from the judgment of McCardie J. (1) in an action tried before the learned judge without a jury.

By an agreement dated August 22, 1919, the plaintiff sold his business to the defendants, a limited company, as from January 1, 1919, for the sum of 120,000*l.* The material clauses of the agreement were as follows :—

" 2. There shall be excepted out of the sale hereby agreed upon assets equivalent to the liability for excess profits duty and income and super tax for the year 1918 and to the amount of the liabilities of the business all as shown in the balance sheet at midnight on December 31, 1918 . . . . " other than certain specified liabilities.

" 5. The vendor shall pay discharge and satisfy all debts and liabilities of the said business including income tax and excess profits duty up to December 31, 1918."

" 7. The purchase shall be completed on . . . . September 15, 1919. . . . . The possession of the property hereby agreed to be sold shall be retained by the vendor until completion and he shall in the meantime carry on the said business as heretofore and from December 31, 1918, shall be deemed to have been carrying on the said business on account of and for the benefit of the purchasers and the vendor shall account and be entitled to be indemnified accordingly."

" 13. The purchasers shall pay to the vendor as from

(1) [1923] 2 K. B. 234.

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January 1, 1919, up to the actual date of completion a sum at the rate of 208*l.* 6*s.* 8*d.* per calendar month by way of remuneration for his services in connection with the management and carrying on of the business from January 1, 1919, until the actual date of completion."

The plaintiff duly carried on the business from January 1, 1919, in his own name until the actual date of completion for and on behalf of the defendants, and by reason thereof he was assessed by the Commissioners of Income Tax to super tax on the profits earned by him therein for and on behalf of the defendants in a sum of 1459*l.* 1*s.* in excess of that for which he would otherwise have been assessed. This assessment was in respect of the period from April 6, 1919, to August 22, 1919. On appeal by the plaintiff this assessment was affirmed and the plaintiff had to pay the sum of 1459*l.* 1*s.*, and he incurred costs to the amount of 30*l.* 10*s.* in connection with the assessment and appeal. The defendants, who were duly informed of these proceedings, were then called upon to indemnify the plaintiff in respect of those two sums, and as they denied liability therefor the present action was brought in which the plaintiff claimed to recover those amounts.

McCardie J. gave judgment for the plaintiff.

The defendants appealed.

Schiller K.C. and *Blanco White* for the appellants.

Compston K.C. and *Croom-Johnson* for the respondent were not called on.

BANKES L.J. This case is too clear for serious argument. The respondent had been carrying on a very successful business. On August 22, 1919, he sold it to the appellants, a newly formed limited company, from the previous January 1. The contract of sale dealt with income tax and super tax for the year 1918. The period between January 1, 1919, and September 15 of that year, which was the date named for completion, was provided for by clauses 7 and 13 of the contract. Clause 7 provided that the respondent should

retain possession of the property until completion and should carry on the business and from December 31, 1918, should be deemed to have been carrying it on for the benefit of the appellants and on their account, and should be entitled to be indemnified accordingly. That is how the parties dealt with the matter. But between the respondent and the revenue authorities the respondent was between January 1 and September 15 carrying on business on his own account. There is no dispute that he was liable to pay income tax and that the appellants were liable to indemnify him for the payments he made on that account; but it is said that super tax is only imposed on individuals and not upon companies and therefore the appellants must be treated as if no super tax had been imposed at all. Sect. 7 of the contract affords the answer to this contention. The appellant was to carry on the business. That could not be done without incurring the tax. And he was to be "entitled to be indemnified accordingly." The appeal must be dismissed.

SCRUTTON L.J. I agree. I suppose the respondent sold the net profits, and not the gross profits, of the business. I can see no material difference between income tax and super tax. They are both taxes on profits. Why the respondent should be indemnified in respect of the one and not of the other is more than I can understand.

ATKIN L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Billinghurst, Wood & Pope.*
Solicitors for respondent: *E. Flux, Leadbitter & Neighbour.*

W. H. G.

C. A.
1923
Nov. 1.

[IN THE COURT OF APPEAL.]

SALTER *v.* LASK.

Landlord and Tenant—Action for Possession—Claim for Part of demised Premises—Rent Restriction—Statutory Defence—County Court Rules, 1903, *Order* x., *r.* 18—*Increase of Rent and Mortgage Interest (Restrictions) Rules*, 1920, *r.* 18.

1. A landlord seeking to recover possession at the expiration of a tenancy by effluxion of time or notice to quit is not bound to include in his claim the whole of the demised premises, but may confine his claim to part only of the premises in a proper case, for example, where he has already resumed possession of the other part.

2. Sect. 5 of the Rent (Restrictions) Act, 1920, is not a statutory defence or one of which notice must be given under Order x., r. 18, of the County Court Rules, 1903. Where, in an action in the county court to recover possession of a dwelling house, the evidence is sufficient to put the judge upon inquiry whether the house is one to which the Rent (Restrictions) Act applies, he is bound by r. 18 of the Increase of Rent (Restrictions) Rules, 1920, to inquire and determine whether the house is within the Act and, if it is, to decide whether the Act permits him, and whether it is reasonable, to make an order or give judgment for the recovery of possession thereof.

Per Atkin L.J. Sect. 59 of the County Courts Act, 1888, and s. 3 of the County Courts Act, 1903, limit the jurisdiction of the county court. Their operation is not confined to the effect of the proviso to the earlier section.

Judgment of the Divisional Court [1923] 2 K. B. 798 affirmed on the first point.

New trial ordered on the second point.

Appeal from the decision of a Divisional Court (1) on appeal from the judge of the Whitechapel County Court.

The action was brought by the landlord against the occupier to recover possession of No. 5 Bell Lane in the City of London.

In 1913 two houses Nos. 3 and 5 Bell Lane with a workshop behind them were let by one demise by the owner, one Lyon, to the defendant from year to year at a rent of 2*l.* 2*s.* a week. In 1916 the defendant went to the war and his wife was substituted as tenant of the demised premises. In the same year she sublet the workshop to one Cohen at a rent of 1*l.* a week, and sublet one of the houses, No. 3, to one Rich at 19*s.* a week. In 1917 Rich took from Lyon a lease for

(1) [1923] 2 K. B. 798.

twenty-one years of the whole of the demised premises subject to the tenancy of the defendant's wife, who thenceforth paid 23*s.* a week rent instead of 2*l.* 2*s.*, first to Rich and then to the plaintiff, his assignee.

On September 6, 1921, Rich assigned his twenty-one years' lease to the plaintiff, but remained in possession of No. 3 as tenant to the defendant's wife at a rent of 19*s.* a week.

On March 23, 1921, Rich had given the defendant's wife notice to quit the whole of the demised premises on April 23, 1922, or at the end of the half year at the expiry of her year of tenancy, which was in fact September 23, 1922. On May 6, 1922, a notice of intention to increase the rent payable by the defendant's wife was given on behalf of Rich. It alleged that the standard rent of the whole of the demised premises was 78*l.* a year. On July 31, 1922, the plaintiff granted to Cohen a tenancy of the workshop.

On September 27, 1922, the defendant's wife died. The defendant became her administrator. On December 6, 1922, the present action was brought to recover possession of No. 5. The county court judge gave judgment for the defendant. In the course of his judgment he said :—

"The claim was for possession of No. 5 Bell Lane only, not of Nos. 3 and 5. The evidence was that Nos. 3 and 5 with a workshop at the rear of both were let as one holding first to the present defendant and then to his wife, the defendant being now her administrator. The lessor Rich, who let to the defendant and to his wife and before action had assigned to the plaintiff, became tenant to the defendant (1) of No. 3 at 19*s.* a week, and the defendant (1) instead of paying to Rich the full 2*l.* 2*s.* a week for Nos. 3, 5, and the workshop, arranged to pay 23*s.* only to Rich, whose 19*s.* would make up the difference. The two houses are jointly rated and the property tax is assessed on the two together and paid by the defendant.

"The plaintiff having taken from Rich an assignment of the lease contended that he by his tenant Rich is in

(1) Quaere, the defendant's wife.

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possession of No. 3 and therefore need only sue for ejectment of the defendant from No. 5.

"The defendant says he is in possession of No. 3 by his tenant Rich, and that he pays rates and taxes on both; therefore the plaintiff is not in possession of No. 3 and cannot by action eject the defendant from part only of his holding. The defendant also contends that if he were sued in ejectment for the whole the county court would have no jurisdiction.

"I held that the defendant had never given up possession of No. 3, nor had it been surrendered to Rich, nor had a new tenancy of No. 5 been created. Rich as tenant could have left No. 3 at any time by giving a week's notice and could have compelled the defendant or his predecessor to pay the whole 2*l.* 2*s.* for Nos. 3 and 5 and the workshop. Therefore I decided that the plaintiff could not eject the defendant from part only of his estate.

"If the plaintiff were suing for the whole of the demised premises, the property being rented at 2*l.* 2*s.* a week there would be no jurisdiction in the County Court."

The plaintiff appealed to the Divisional Court, and that Court (McCardie and Salter JJ.) reversed the judgment of the county court judge and held that a landlord might recover a portion of the demised premises (1), and that the tenant could not rely on the Rent (Restrictions) Act, 1920, not having given notice of that defence.

The defendant appealed.

R. D. Ross (*Quass* with him) for the appellant. The Divisional Court was wrong in holding that the defence that the premises in question are within the provisions of the Rent (Restrictions) Act, 1920, is a statutory defence of which notice must be given by the County Court Rules, Order x., r. 18. (2) Sect. 5 of the Act of 1920 (2) restricts

(1) [1923] 2 K. B. 798.

(2) County Court Rules, 1903 to 1923, Order x., r. 18: "When in any action the defendant relies on any statutory defence, or on any defence of which he is required by the Act or any statute to give notice, he shall in his statement . . . . set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies, or otherwise sufficiently

the jurisdiction of the Court: *Barton* v. *Fincham* (1); and the Court is not bound to wait until the matter of its jurisdiction is raised by the parties; on the contrary it is bound to inquire into the value of a dwelling house when the facts appear to raise the question, and to apply the provisions of the Rent (Restrictions) Act if the house either by reason of its rent or its rateable value is within the Act. That is the effect of r. 18 of the Increase of Rent (Restrictions) Rules, 1920. (2) The Court below was also wrong in holding that there was nothing to put the county court upon inquiry whether the value of the premises was such as to bring them within the Act. The rent of the two houses and the shop was 109*l.* a year. Only one house was being recovered. The notice to increase the rent given in May, 1922, made it incumbent on the county court judge to inquire into the rateable value. This has never been done, and it ought to have been done. Counsel for the defendant was in the act of challenging the jurisdiction of the county court, relying

indicate the nature of the defence on which he relies."

Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, dated July 9, 1920. Rule 18: "Where proceedings are taken in the county court for the recovery . . . . of possession of any premises to which the Act applies, or for the ejectment of a tenant from any such premises, the Court shall, before making an order for the recovery of . . . . possession or ejectment, satisfy itself that such order may properly be made, regard being had to the provisions of the Act."

County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 59: "All actions of ejectment, where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 100*l.* [see County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3] by the year, may be brought and prosecuted in the Court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the summons, apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the ground that the title to lands or hereditaments of greater annual value than 100*l.* [see County Courts Act, 1903, s. 3] would be affected by the decision in such action; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the Court in such action shall be discontinued."

(1) [1921] 2 K. B. 291.

(2) See note (2) ante, p. 756.

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on s. 59 of the County Courts Act, 1888, and s. 3 of the County Courts Act, 1903, and on the fact that the rent of the demised premises was over 100*l.* a year, and was intending and prepared to raise the question under the Rent (Restrictions) Act if beaten on the point of jurisdiction; but the county court judge decided in the defendant's favour on another point—namely, that the plaintiff must sue for the whole of the demised premises, or he could not recover anything.

Beyfus for the respondent. The party who relies upon the rateable value is the one to give evidence of it. He gave none. The Court will not infer that if given it would have been in his favour. The standard rent of the demised premises is 109*l.* a year.

[ATKIN L.J. That is the rent of the whole. What was the standard rent of No. 5 ?]

There is no evidence of that. Where there is no evidence of the value of the premises the county court judge is under no duty to institute an inquiry. He is not to decide questions which are not raised. By s. 12, sub-s. 2, the Act applies to part of a house let as a separate dwelling where the standard rent or rateable value does not exceed 105*l.* a year. But that does not include the whole of a house which, being part of premises included in one demise, is used as a separate dwelling : *Woodifield* v. *Bond.* (1) A dwelling house within the meaning of the Act includes land or premises let together with a house, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house : s. 12, sub-s. 2 (iii.). If the rateable value of the workshop amounts to 16*l.* it will be enough to take the premises beyond the scope of the Act.

Counsel was not called upon in reply.

BANKES L.J. This case must go back to the county court to be further considered. The county court judge did not direct his mind to the provisions of the Rent (Restrictions) Act, because he thought the defendant was plainly entitled to judgment on other grounds. [The Lord Justice then stated

(1) [1921] W. N. 309.

the facts and continued :] Counsel for the defendant went to the county court intending to argue (1.) that the Court had no jurisdiction to hear the case, and (2.) that if it had, the Rent (Restrictions) Act applied and protected his client. When he began to make his second point in his cross-examination, the county court judge intimated that inasmuch as the action was to recover possession of No. 5 only it was not maintainable because, in his view, there could not be an action to recover part only of the premises included in one demise, and on that point he gave judgment for the defendant. The plaintiff appealed. The Divisional Court took the view that the county court judge was wrong and that it was open to the plaintiff in an action of ejectment to recover part of the demised premises. I agree with that view. If the plaintiff had already recovered possession of No. 3, surely that fact would not preclude him from recovering No. 5 by an action if he could not obtain possession otherwise. No doubt there may be cases in which a landlord deliberately suing for possession of a portion only, when he might sue for the whole, of the demised premises, may find himself in difficulties if he afterwards sues to recover the remainder ; for example, if he should employ that device in order to circumvent an objection by the defendant to the jurisdiction of the county court or to invoke in his own favour the provisions of the Rent Restriction Act. But apart from these exceptional circumstances, and so far as concerns the general law, I prefer the view of the Divisional Court to that of the county court judge.

But that does not dispose of the matter. When the case came before the Divisional Court objection was taken to any defence based on the Rent (Restrictions) Act on the ground that no such defence was raised in the county court. Even if it was not, r. 18 of the Increase of Rent (Restrictions) Rules places upon the judge the duty to inquire whether the premises are within the Act when there is, as there was here, sufficient material to put him upon inquiry whether they fall within its provisions. It is true there was evidence that the rent was two guineas a week, but no evidence was

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given of the rateable value. It was argued that it was for the defendant to give evidence of the rateable value if he relied upon it; but he ought not to be shut out from giving it by the fact that the judge decided in his favour on another point. Again, the plaintiff was seeking to treat No. 5 as a separate dwelling house; and the notice to increase the rent, even if valueless in itself, yet called attention to the possibility that the rent of the premises originally demised might be 78*l.* a year, and was enough to put the county court judge on inquiry whether they were within the Act. The case must go back to the county court that the judge may decide this question. Whether they are within the Act or are taken out of its operation by s. 12, sub-s. 2 (iii), must depend on the evidence.

SCRUTTON L.J. I am of the same opinion. Two houses and a workshop behind them were all let on one demise. Notice to quit the premises was given. When this notice had expired the plaintiff, who was then entitled to the reversion, but was himself in possession of one of the houses, and of the workshop by his tenant Cohen, brought an action in the county court to recover the other house, No. 5. The county court judge took the view that, as several actions cannot be brought to recover one debt, so several actions cannot be brought to recover premises comprised in one lease. The Divisional Court thought this was erroneous, and I agree with that decision.

The view taken by the county court judge made it unnecessary for him to decide whether the house sought to be recovered was within the Rent (Restrictions) Act, 1920, and whether, if it was, he should make an order for possession. The Divisional Court thought that as no one had expressly mentioned the Rent (Restrictions) Act in the county court they ought not to consider its effect. I do not agree with that decision. In my opinion the Act imposes upon the county court judge the duty of deciding whether the property comes within its provisions and, if it does, whether he should make or refuse an order for possession. The case

must go back to the county court judge for a new trial upon those matters. Probably in the course of that hearing the question will emerge whether the county court has any jurisdiction to deal with the case at all in view of s. 59 of the County Courts Act, 1888, and s. 3 of the County Courts Act, 1903.

ATKIN L.J. I agree. I see no reason why a reversioner suing in ejectment, when a tenancy has been determined by effluxion of time or notice to quit, and when he has resumed possession of part of the demised premises, should not recover possession of the remainder. It is not necessary to determine how the case would stand if the tenant still remained in possession of the part not sought to be recovered.

There still remains a question to be decided. In my view the effect of the Rent (Restrictions) Act was sufficiently raised in the county court, for both parties directed evidence to points which were irrelevant unless they referred to that Act. I am quite satisfied that the effect of this Act is not one of those statutory defences of which notice must be given under Order x., r. 18, of the County Court Rules. A defence founded on that Act is entirely removed from the category of statutory defences both by the principle of the Act itself and by r. 18 of the rules made under the Act; and in my opinion it was open to the defendant to raise the point in the Divisional Court. It is not necessary to consider closely the wording of r. 18 of the Increase of Rent (Restrictions) Rules; it is sufficient to say that as at present advised I am not to be taken as approving of the construction placed upon that rule by the Divisional Court. The case must go back to the county court to see whether the defendant is entitled by the Rent (Restrictions) Act, 1920, to resist the plaintiff's claim for possession. If it should be decided that the house is not within the Rent (Restrictions) Act, there will be the further question whether it is within the jurisdiction of the county court. I am clearly of opinion that s. 59 of the County Courts Act, 1888, and s. 3 of the Act of 1903 limit the jurisdiction of the county court, and their effect

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is not confined to the operation of the proviso in the earlier Act enabling an application to be made to the High Court to transfer the case to that Court if the title to lands or hereditaments of greater annual value than 100*l.*, the amount limited by the later Act, would be affected by the decision in the action.

Case remitted to the county court.

Solicitor for appellant: *L. Silkin.*
Solicitors for respondent: *Gery & Brooks.*

W. H. G.

1924 *Jan.* 28, 29; *Feb.* 6.

PERFORMING RIGHT SOCIETY, LIMITED *v.* MITCHELL AND BOOKER (PALAIS DE DANSE), LIMITED.

[1922. P. 3354.]

Copyright—Musical Work—Infringement—Performance in Hall by Band—Servants or independent Contractors—Express Prohibition of Infringement of Copyright—"Authorising" Performance—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 1.

The Copyright Act, 1911, s. 1, sub-s. 2, provides that "for the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform .... the work or any substantial part thereof in public .... and shall include the sole right" to do certain specified things, "and to authorise any such acts as aforesaid."

Sect. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything, the sole right to do which is by this Act conferred on the owner of the copyright. . . . ." :—

Held, that the word "authorise" in s. 1, sub-s. 2, is superfluous, and that there is nothing in the sub-section which cuts down the liability under s. 2, sub-s. 1, in respect of an infringement of copyright.

Fenning Film Service v. *Wolverhampton, Walsall and District Cinemas* [1914] 3 K. B. 1171 considered.

The defendants, who were the occupiers of a dancing hall, engaged, on the terms of a written agreement, a band to provide music therein. The agreement provided that the band should not, in the music played, infringe any copyright, and should be liable for damages and costs caused by any infringement. There was also a notice posted in the hall that "only such music as may be played without fee or licence is allowed to be played in this hall." On one occasion the band played

certain music the copyright of which belonged to the plaintiffs, without the plaintiffs' licence; but the defendants did not know, and had no reasonable ground for suspecting, that this infringement would take place. In an action by the plaintiffs for damages and an injunction:—

Held that, on its true construction, the agreement between the defendants and the band constituted the latter the servants of the defendants, and not independent contractors; that the band on the occasion in question were acting in the course of their employment; that the defendants were liable under s. 2 of the Copyright Act, 1911, for the infringement of copyright; and that the plaintiffs were entitled to damages and an injunction.

The tests for deciding whether a person is a servant or an independent contractor considered.

ACTION tried by McCardie J.

The plaintiffs, who were the proprietors of the sole right of performing in public certain musical works, including two known as "J'en ai marre" and "Mon Homme," alleged that on November 30, 1922, the defendants infringed their copyright in those two musical works by performing them in public at their Palais de Danse, Hammersmith, or by authorizing their performance in public without the plaintiffs' consent; and further, or in the alternative, the plaintiffs alleged that the defendants infringed the plaintiffs' copyright in those two musical pieces by permitting their Palais de Danse to be used for the said performance for their private profit without the plaintiffs' consent.

The defendants denied that they performed or authorized the performance of the two musical works, and said that they were not aware and had no reasonable ground for suspecting that the performance at their Palais de Danse would be an infringement of copyright; and they relied on a printed notice put up in the hall to the effect that "only such music as may be played without fee or licence is allowed to be played in this hall," and, further, upon a clause in their contract with the band that the band should not infringe any copyright, and should, in the event of infringement, be liable for damages and costs incurred by infringement.

The infringement alleged was by a band engaged under a written agreement by the defendants to play in the Palais de Danse, and the judge found as a fact that there was an infringement by the band.

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PERFORMING RIGHT SOCIETY, LD. v. MITCHELL AND BOOKER (PALAIS DE DANSE), LD.

Hon. S. O. Henn Collins for the plaintiffs.

Grant K.C., St. John Field and *Lloyd-Williams* for the defendants.

Cur. adv. vult.

Feb. 6. MCCARDIE J. read his judgment, which after stating the facts and setting out ss. 1 and 2, sub-ss. 2 and 3, of the Copyright Act, 1911, continued: The vital question is whether the defendants are responsible for the acts of the band. Mr. Henn Collins for the plaintiffs abandoned the claim against the defendants under s. 2, sub-s. 3. I think he was right in doing so. Excluding the question of the liability of the defendants for the acts of the band, I am satisfied that the defendants did not "permit," within the meaning of s. 2, sub-s. 3, the infringing performances. They did not know that the infringing performances would take place or that they were in fact taking place. They had no reasonable ground for suspecting that there would be an infringement of copyright by the band. No programme of music was printed or announced. Clearly printed notices were put up by the defendants which were worded as follows: "To Band Conductors, Musicians, etc. Important. Only such music as may be played without fee or licence is allowed to be played in this Hall. Controlled music is strictly prohibited and the proprietor will not be responsible for any infringement." The plaintiffs, as I have said, owned a large number of copyright pieces. But outside the range of the plaintiffs' ownership there was a very extensive list of dance music which could be given by the band.

I must further state that the contract with the band (with which I will deal hereafter) contained a clause that the artists should not infringe any copyright or other proprietary rights of third parties and should in the event of infringement be liable for damages and costs incurred by the infringement. The contract between the defendants and the band was made on December 20, 1921. It was expressed to be made between the defendants (called the management) and the band of five jazz musicians, known as the Original Lyrical Five, under the

management of Syd Roy (thereinafter called "the Artists"). It contained twenty-four clauses. The question was fully and ably argued before me whether under that contract the band were independent contractors or were servants of the defendants. If the band were servants, then, subject to the other points raised, the defendants are prima facie liable for the infringing performances on the principle of qui facit per alium facit per se. If the band were independent contractors then, subject to other points raised by the plaintiffs, the defendants prima facie are not liable. I point out at once that in two cases which have recently been before the Courts the points here at issue did not arise for decision. Mr. Henn Collins, counsel for the present plaintiffs, was counsel in each of those other cases, and he informs me that in *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1), and in *Performing Right Society* v. *Bradford Corporation* (2), the bands in question were servants in the full legal sense.

Now, before I deal with the first important matter, let me state one or two things which are, I conceive, plain. First, that the band themselves could have been sued for infringement of copyright. A band, however, is often a migratory thing, and an action against it only might be of small avail to the plaintiffs. Secondly, that the defendants would be clearly liable for infringement although the band were in law and in fact independent contractors if the defendants had actively directed, counselled or aided, the infringement: see per Tindal C.J. in *Petrie* v. *Lamont* (3), *M'Laughlin* v. *Pryor* (4), and *Cargill* v. *Bower* (5); and see also per Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate.* (6) I feel, too, that *Marsh* v. *Conquest* (7) is, after all, a mere illustration of the same principle. This rule of law is not, I think, cut down by the words of s. 2, sub-s. 3, which enlarge rather than limit liability. Thirdly, that the question whether a man be a servant or an independent contractor is often a mixed

(1) Ante, p. 1.
(2) Macgillivray's Copyright Cases (1921) 309.
(3) (1841) Car. & M. 93, 96.
(4) (1842) 4 Man. & G. 48.
(5) (1878) 10 Ch. D. 502, 513-14.
(6) [1893] 1 Q. B. 629, 634.
(7) (1864) 17 C. B. (N. S.) 418.

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question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances.

It seems convenient, here examining the agreement with the band, to consider the tests to be applied in deciding whether a man be a servant or an independent contractor. Those words have been discussed in many cases. Definition has been difficult: see Macdonell's Master and Servant, 2nd ed., p. 9. The word "servant" has been used in many aspects and in many statutes. Here we are freed from any question of the context or purpose of an Act of Parliament. The case is to be decided on general principles. The decisions are numerous and not always easy to follow. The distinction between "servant" and "independent contractor" does not seem to rest merely on the magnitude of the task undertaken. Thus, whilst a labourer employed to cleanse drains at 5*s.* for the job was held to be a servant and not a contractor: see *Sadler* v. *Henlock* (1), a plumber called in by a landlord to mend a leaky cistern was held to be an independent contractor and not a servant: see *Blake* v. *Woolf.* (2) A licensed drover has been held to be an independent contractor and not a servant: see *Milligan* v. *Wedge* (3), on the ground that he exercised an independent calling. So, too, in *Rapson* v. *Cubitt* (4) a gas-fitter was held to be an independent contractor. On the other hand, I conceive that a general manager, at a high salary, of a partnership, or the managing director of a limited company at an even higher salary, are usually servants and not independent contractors, and in many cases a partnership or a limited company has been held liable for their negligence or breach of duty. The word "salary" may be as applicable to a servant as the word "wages," for the use of the word "salary" is only a matter of fashion and etiquette: see per Lord Sumner in *Great Western Ry. Co.* v. *Bater* (5), and see also *Moriarty* v. *Regent's*

(1) (1855) 4 E. & B. 570.
(2) [1898] 2 Q. B. 426.
(3) (1840) 12 Ad. & E. 737.
(4) (1842) 9 M. & W. 710.
(5) [1922] 2 A. C. 1, 28-29.

Garage and Engineering Co. (1), and *In re Countess of Rosse.* (2) The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question. But it seems clear that a more guiding test must be secured. In Macdonnell's Master and Servant, 2nd ed., p. 7, a servant is defined as " one who for a consideration agrees to work subject to the orders of another." This is useful but not, I venture to think, complete. The following words from Smith's Master and Servant, 7th ed., p. 238, give point to that remark: " The employer [i.e. of an independent contractor] may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor has agreed to carry out for him, of deciding as to the quality of materials and workmanship, of stopping the works or any part thereof at any stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he will not thereby of necessity render himself liable to third persons for the negligence of the contractor in carrying out the works." I may refer to *Reedie* v. *London and North Western Ry. Co.* (3); *Steel* v. *South Eastern Ry. Co.* (4) (a striking case); and *Hardaker* v. *Idle District Council.* (5) That passage in Smith's Master and Servant shows the difficulty of decision in certain cases. It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance. The point is put well in Pollock on Torts, 12th ed., pp. 79, 80: " The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other.

(1) [1921] 2 K. B. 766.
(2) [1923] W. N. 88, 148; 129 L. T. 592.
(3) (1849) 4 Ex. 244.
(4) (1855) 16 C. B. 550.
(5) [1896] 1 Q. B. 335.

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A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work': see per Crompton J. in *Sadler* v. *Henlock*. (1) A servant is a person subject to the command of his master as to the manner in which he shall do his work: see per Bramwell L.J. in *Yewens* v. *Noakes* (2), and the master is liable for his acts, neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand." The rule is stated in much the same way in Salmond's Law of Torts, 6th ed., p. 96, where that able jurist says: "A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master"; and he illustrates his statement as follows: "Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I." I need not here mention the cases quoted by the author on the points he is dealing with. So, in like fashion also is the matter dealt with in Clerk and Lindsell on Torts, 7th ed., pp. 65, 66, where it is added: "Those agents of the former class whose employment is more or less continuous are usually styled servants, whilst those whose employment is intermittent or confined to a particular occasion, are usually called by the generic name of agents. Between servants, however, and other agents over whom the employer reserves control, there is no distinction in point of law; the employer is liable for the torts of the one to the same extent and subject to the same conditions as he is liable for the torts of the other." I need

(1) 4 E. & B. 570, 578. (2) (1880) 6 Q. B. D. 530, 532

only refer further to the words of Bowen L.J. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate.* (1) They are these: "By the employer is meant the person who has a right at the moment to control the doing of the act." This judgment of Bowen L.J. was approved by the Privy Council in *Bain* v. *Central Vermont Ry. Co.* (2) It is not without interest to observe that much the same rule prevails in criminal as in civil law, and many of the decisions are instructive. I need only make reference to Archbold's Criminal Pleading, 26th ed., pp. 601, 612, and to the judgment of Blackburn J. in *Reg.* v. *Negus* (3), where he says: "The test is very much this, viz., whether the person charged [that is, as a clerk or servant] is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control."

Bearing these matters in mind, I briefly summarize the agreement of December 20, 1921, with the band. It provided for five jazz musicians—namely, a pianist, Mr. Syd Roy, a violinist, an alto saxophonist, a soprano saxophonist, and a drummer. They were called the artists and were described as under the management of Syd Roy. Clause 3 was as follows: "The artists agree to appear and perform both afternoon and evening each day including Sundays at such time as may be fixed by the management"—that is the defendants—"not exceeding seven hours per day as musicians for dance music and to entertain by singing and playing to the best of their skill and ability and to the satisfaction of the management at the Palais de Danse or any place in which the management or its managing director is interested, either in London or elsewhere." This clause, however, is a little modified by cl. 24, to the effect that the artists are not to be sent out of London without their consent. Clause 4 provided that the artists should provide their own instruments and play the latest music, but should not infringe any

(1) [1893] 1 Q. B. 629, 634. (2) [1921] 2 A. C. 412.
(3) (1873) L. R. 2 C. C. 34, 37.

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copyright and should be liable for damages and costs caused by infringement. Clause 5 was that none of the artists should perform at any restaurant, club, or place of entertainment, either public or private, or assist in the making of records, without the permission of the defendants. Clause 6 was that if an artist fell ill the defendants could replace him with a deputy and should be liable only to pay the net cost of the deputy. Clause 7 provided: "This contract is made, and, subject to its clauses and stipulations, shall remain in force for one year, during which period the services of the artists shall be wholly at the exclusive disposal of the management." It further stated that though every effort would be made to keep the artists employed (such is the actual word), yet the defendants did not guarantee more than forty weeks for the services (such is the actual word) of the artists. It also provided that the defendants could determine the contract at the end of the third, sixth or ninth month, on notice in writing. Clause 8 said: "Syd Roy shall (subject to the rights express or implied of the management hereunder) exercise the control and management of the orchestra, but shall comply with instructions which shall be given to him from time to time by the management or its duly accredited representative as to the nature of the music rendered, and he and the members of the orchestra shall comply with the rules and regulations of the management." Clause 9 provides that the artists shall, in the event of a special fête, work more than seven hours without extra pay (such are the actual words). Clause 10 provides that in the event of suspension of the performance through contingencies beyond the control of the management, no salary (such is the actual word) shall be payable. Clause 12 provides that the management will pay the artists through Syd Roy the total sum of 76*l.* per week. Clause 13 says that the artists shall be liable for any accident resulting from their performance. Clause 17 says that the salary payable under the contract shall not be assigned except with the consent of the management. Clause 18 provides that the management may at once end the agreement if the artists or any of them (*a*) break any provision of the agreement,

(*b*) shall be intoxicated, (*c*) are wilfully careless or inattentive or use improper language, etc., (*d*) refuse or neglect to carry out or perform the reasonable instructions and requirements of the management relating to the performance of the artists, (*e*) leave the United Kingdom without the consent of the management.

Such is the agreement which was signed by each member of the band. In my humble opinion it is an agreement which made the band the servants of the defendants. It provides for seven hours' daily service. It uses the word "services." It mentions "salary." It mentions "pay." It uses the word "employ." It provides for a period of employment. It provides that the band shall play at any place in London where the defendants may direct. It provides that their services shall be at the exclusive disposal of the defendants. It gives the defendants the right of immediate dismissal for the breach of any reasonable instructions or requirements. Above all it gives, I think, to the defendants the right of continuous, dominant, and detailed control on every point, including the nature of the music to be played. In my opinion this is not a case of an independent contractor agreement with some features of a service agreement; it is a case rather of a service agreement with several peculiar features appropriate to the employment of a band. I think that just as the defendants would be prima facie liable for the negligence of the band causing physical injury to third persons, so they are prima facie liable for infringement by the band of copyright. The principle of respondeat superior is far-reaching. I may add that the case of a great singer or a great violinist who gives one or more isolated performances may often present contractual arrangements quite different from those now before me.

In view of the ruling I have just given I must consider the next point taken in the able arguments of Mr. Grant, Mr. St. John Field and Mr. Lloyd-Williams for the defendants. They submitted that, even if the band were servants of the defendants, yet that, in view of the prohibition of infringement, both in cl. 4 of the agreement and in the public

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notice, the defendants could not be fixed with liability. In substance this raises the question whether the principle of *Limpus* v. *London General Omnibus Co.* (1) applies in favour of the present plaintiffs. There the defendants' driver, contrary to express instructions not to race with or obstruct other omnibuses, had upset the plaintiff's omnibus by pulling across the road in front of it. It was held that the defendants were liable, for the servant was acting in the course of his employment. I cannot doubt that in the present case the band were acting in the course of their employment and for the defendants' benefit, for they were engaged for the very purpose of playing dance music at the defendants' hall. I am satisfied, moreover, that they did not infringe copyright knowingly or wilfully; as to which see Pollock on Torts, 12th ed., p. 94. The plaintiffs' inspector spoke to Mr. Syd Roy after the two pieces had been performed. This was the conversation: The inspector said: "You know that you have played 'J'en ai marre' and 'Mon Homme'?" Mr. Syd Roy replied "Yes." The inspector then said, "You ought not to have done so, as they belong to the Performing Right Society." Mr. Roy replied, "I did not know that," and he added: "I am not quite sure what works belong to the Society, and we are hampered by the defendants not holding a licence." This is not a case of wilful misconduct by the band for their own purposes, and it seems clear, therefore, that the case of *Joseph Rand, Ld.* v. *Craig* (2), cited by Mr. Grant, has no application here.

Holding, therefore, as I do, that the band were the defendants' servants acting in the course of their employment, and that the defendants' general prohibition of infringement does not absolve them from responsibility, it follows that the plaintiffs must succeed unless the next argument of Mr. Grant for the defendants be a sound one. It is this: he points to the word "authorise" in s. 1; then he points to the wording of s. 2 to the effect that infringement is committed by doing anything the sole right to do which is conferred on the owner of the copyright; then he says that

(1) (1862) 1 H. & C. 526. (2) [1919] 1 Ch. 1.

the two sections must be read together; and, therefore, he submits, that a master is not liable for the infringement by his servant unless he, the master, actually authorized the infringement complained of. With all respect, I cannot accept this argument. I see nothing in s. 1 which cuts down liability under s. 2. It is my own view that the word "authorise" in s. 1 is superfluous, and I agree with the opinion of Scrutton L.J. in *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1) and with the view of Mr. Macgillivray at p. 22 of his work, published in 1912, on the Copyright Act, 1911. It is true that in *Fenning Film Service* v. *Wolverhampton, Walsall and District Cinemas* (2) a learned judge took the view that the effect of the word "authorise" in s. 1 is to extend the liability imposed by s. 2 so as to make a man liable in tort for having authorized a performance which never in fact took place. I venture to think, however, that it may well be one thing to authorize a performance which actually occurs and where the authorization may therefore make a man a joint tortfeasor, and another thing merely to authorize a performance which never in fact takes place. One curious result of holding that the latter is a tort would be that once the authorization was actually given the person who gave it would apparently remain liable for the tort even though he immediately afterwards cancelled the authorization upon discovering that copyright would be infringed.

It follows from what I have ventured to say that the points raised by the defendants fail. I ought to add that even if the band here had been independent contractors it might be that the defendants would still be liable in spite of the general prohibition I have referred to. It might be argued by the plaintiffs that the defendants did not in fact trouble at all about the music played by the band in the defendants' own hall for the defendants' own purposes. I should so find. The defendants, moreover, undoubtedly left it to the band to select their own music, and they did not in that matter exercise the legal power of control they possessed. The

(1) [1924] 1 K. B. 1, 12. (2) [1914] 3 K. B. 1171.

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case may, therefore, fall within *Monaghan* v. *Taylor* (1), which the Court of Appeal in *Performing Right Society* v. *Ciryl Theatrical Syndicate* (2) treated as an authority applicable to the Copyright Act, 1911. This view would not, I think, be opposed to s. 2, sub-s. 3, of the Act, which appears to me primarily to relate to the case of a man who lets or grants the use of his theatre or hall to a third person so that that third person may give his own performance therein. I decide the present case, however, on other grounds.

I must give judgment for the plaintiffs. I assess the damages at 12*l.* for the infringement of the two copyright pieces. I have hesitated upon the granting of an injunction, as I recognize that the case is in some ways unusual. But upon the whole, I think that the plaintiffs are entitled to an injunction. My main reasons are these: firstly, because an injunction is a normal remedy for infringement: see s. 6 of the Act; secondly, because by their defence as delivered the defendants not only denied infringement but also denied the plaintiffs' copyright; and, thirdly, because, although the plaintiffs before trial offered to accept an undertaking in respect of the two pieces the defendants refused, in substance, to give it. In granting an injunction I think that I am supported by *Savory* v. *World of Golf* (3) and *J. T. Smith & Jones* v. *Service, Reeve & Co.* (4) I give judgment accordingly with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Syrett & Sons.*
Solicitors for defendants: *R. C. Bartlett & Co.*

(1) (1886) 2 Times L. R. 685.
(2) [1924] 1 K. B. 1.
(3) [1914] 2 Ch. 566.
(4) [1914] 2 Ch. 576.

J. S. H.

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SAME *v.* BARCLAYS BANK.

Company—"One man company"—Sole Director—Payment by, of Company's Cheques into his own banking Account—Banker crediting Director's Account with Proceeds without Inquiry—Conversion—Companies Act, 1908 (8 *Edw.* 7, *c.* 69), *Table A, art.* 71—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82—*When collecting Banker to be treated as Holder for Value.*

For some years before 1919 one U., a merchant, had a banking account at the defendants' bank. In that year he converted himself into a limited company, all the shares being allotted to himself except one, which was held by his wife. A debenture in the form of a floating charge over the assets of the company was issued to a creditor of U. as a security for his debt. The articles of association of the company incorporated Table A, by para. 71 of which the business of the company is to be managed by the directors. By the articles U. was appointed sole director. After the formation of the company U. kept on his private banking account with the defendants as before, they having notice that his business had been transferred to the company. The company had a separate account, which was kept at another bank, but the defendants had no knowledge of that fact. U. as sole director became possessed of a number of cheques, some crossed and others uncrossed, drawn in favour of the company. He indorsed them "A. L. U., Ltd.—A. L. U. sole director," and paid them in to his own account with the defendants, instead of paying them in to the company's account with the other bank. The defendants, without inquiring whether the company had a separate banking account, collected the cheques and credited U. with the proceeds, which he misappropriated. When doing so they treated him as being identical with the company, as he owned all the shares, and overlooked the materiality of the cheques being drawn in the company's favour and not in his. In an action brought by the company on behalf of the debenture holder for conversion of the cheques:—

Held (1.) that the defendants were precluded from setting up that U., when paying the cheques in to his own account, was acting within the scope of his apparent authority as agent of the company, upon two grounds: first, that the act of an agent paying his principal's cheques in to his own account was so unusual as to put them on inquiry, that they ought to have inquired whether the company had a separate banking account, and, if it had, why the cheques were not paid in to that account, and that their failure to make that inquiry amounted to negligence; and secondly, that U. when paying in the cheques did

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not purport to act as the company's agent, but as being himself the company, and that the defendants so treated him;

(2.) that with respect to the cheques which were crossed the omission to inquire about the company's banking account disentitled the defendants as collecting bankers to the protection afforded by s. 82 of the Bills of Exchange Act, 1882.

A customer of a bank paid in to his account some cheques to which he had no title. Immediately on his so paying them in the bank credited him with the amounts of the cheques in their ledger, but there was no agreement between the bank and the customer that he should be allowed to draw against the cheques before they were cleared, nor did he in fact draw against them until after the bank had received the proceeds:—

Held, that, apart from any question whether the bank had notice of any defect in the customer's title, they were not holders in due course, there being no evidence that they took the cheques for value. The mere fact that bankers credit a customer with the amounts of cheques before they are cleared does not make them holders for value; in order to entitle them to that character there must have been an agreement, express or implied, that the customer should be allowed to draw against the cheques before clearance, and that agreement must have been acted upon.

APPEALS from the judgments of Roche J. in two actions tried by him without a jury.

A. L. UNDERWOOD, LIMITED *v.* BANK OF LIVERPOOL AND MARTINS.

The action was for conversion of forty-five cheques of the aggregate value of 8502*l.* 4*s.* the property of the plaintiffs, which the defendants wrongfully placed to the credit of the private account of one A. L. Underwood.

The following statement of the facts is taken from the judgment of Bankes L.J.:—

"The man Underwood, whose dealings with a number of cheques are what has given rise to the action, carried on business as an engineering and machinery merchant. He had at least two banking accounts—one with Messrs. King & Co., and the other with the appellants. His account with Messrs. King was heavily overdrawn in July, 1919, when, to use a colloquial expression, he converted himself into a Limited Company. This Company was incorporated on July the 11th, 1919, under the name of A. L. Underwood, Limited., with a capital of 12,000*l.* divided into 12,000 Shares

of 1*l.* each. The subscribers to the Memorandum of Association were Underwood and a Mr. Callow for one Share each. By the Articles Underwood was appointed sole Director, and at a meeting of the Company held on July the 15th, 1919, at which Underwood was the only person present, the two shares subscribed for as above were allotted, as well as 10,000 fully paid shares to Underwood, being the consideration for the sale of his business to the Company. No other shares in the Company were ever allotted, and Callow's share was, in January, 1921, transferred to Underwood's wife. Upon the formation of the Company a debenture in the form of a floating charge over the assets of the Company was issued to King & Co. as security for the overdraft. The Company's account was kept at Messrs. King's. Underwood continued to keep his private account with the appellant Bank, where he was well known, and had been a customer for many years. Within a few months after the formation of the Company Underwood commenced to pay the Company's cheques in to his private account with the appellants, and they collected the amounts due upon the cheques, and credited Underwood with the proceeds. The cheques so dealt with between December the 20th, 1919, and February, 1922, were 45 in number, for amounts totalling in all to 8502*l.* 4*s.* It was for a conversion of these cheques that the action was brought. Underwood died in November, 1922. A receiver and manager of the Company was appointed by the debenture-holders, and he caused an investigation of the books of the Company to be made by a firm of chartered accountants. The result of their investigation satisfied the learned judge who tried the action that the true inference in reference to the action of Underwood in dealing with these cheques in the way in which he did was that he was acting, as between himself and his Company, in fraud of the Company. I see no reason to question the correctness of the inference so drawn by the learned Judge. An analysis of the cheques gives the following result. Two are missing. Three are uncrossed; one is uncrossed, but marked 'Account payee'; one is uncrossed, but marked

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'Not negotiable, account payee'; 24 are crossed without any special marking; nine are crossed and marked 'Not negotiable; four are crossed and marked 'Not negotiable, account payee'; one is crossed and marked 'Account payee.' All the cheques were drawn in favour of the Company, and were the undoubted property of the Company. All the cheques were indorsed by Underwood 'A. L. Underwood, Ltd. A. L. Underwood, sole director'—that is to say in a form which indicated that he was indorsing them for the Company in his capacity as sole director. He clearly had authority so to indorse them."

Having so indorsed them he paid them in to his own private account with the defendants instead of paying them in to the account of the Company with King & Co. The defendants when collecting the cheques and crediting Underwood with the proceeds did so without inquiring whether the Company had a separate banking account. The defendants denied the conversion, alleging that Underwood, as sole director, had the actual or apparent authority of the Company to pay the cheques in to his own account, and that there was nothing in the circumstances to put them on inquiry as to Underwood's title to them. As to such of the cheques as were crossed they further relied on the protection afforded to them as collecting bankers by s. 82 of the Bills of Exchange Act, 1882. Roche J. held that Underwood had no authority, real or apparent, to pay the cheques in to his own account; and further that the defendants were guilty of negligence when receiving the cheques in not inquiring whether the company had a separate banking account; which latter fact precluded the defendants from relying, as to the crossed cheques, upon s. 82. He therefore gave judgment for the plaintiffs. On the question of damages it was contended for the defendants that the prima facie rule, that the measure of damages in an action for conversion of cheques is their face value, did not apply, because it was said that a number of the cheques were applied by Underwood in payment for goods purchased for the Company. But as there was no evidence to show whether Underwood's account at the time

of dealing with each particular cheque was in credit or not, his Lordship directed an inquiry on that matter, and gave judgment for an amount of damages to be thereafter ascertained.

The defendants appealed.

Maugham K.C., *Stuart Bevan K.C.* and *E. Forster* for the appellants. No action will lie against the bank for the conversion of these cheques, for Underwood had actual authority from the company under their articles of association to deal with them as he thought proper. The memorandum of association included among the objects of the company: 12. "To accept, make, execute and indorse bills of exchange, promissory notes, or other negotiable instruments." By the Articles of Association, art. 1, the provisions of Table A are to apply to the company, and by para. 71 of Table A: "The business of the company shall be managed by the directors, who may . . . . exercise all such powers of the company as are not by the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, or by these articles required to be exercised by the company in general meeting." By art. 7: "A. L. Underwood shall be the first and, until other directors are elected, sole director of the company. . . . . All acts or deeds which, under Table A, require the signature or attestation of two directors, may be performed or witnessed by one director." By art. 16: "A resolution in writing signed by the sole director or all the directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted." Where there is only one director it is within his authority to pay the company's cheque in to any account he chooses. If having under that authority paid them in to his own account he subsequently misappropriates the proceeds that will not impose any liability upon the bank, for they are not concerned with the motive with which he paid the cheques in. But even if he had not actual authority to pay the cheques in to his own account he was acting within the apparent scope of his

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authority in so doing, and the defendants were entitled to assume that everything was in order. The indorsement of the cheques was perfectly regular, and not such as to put the defendants on inquiry. They must be treated as having full knowledge of Underwood's authority as sole director, whether they in fact knew anything about it or not, for every one who deals with a company is affected with notice of its constitution under the memorandum and articles of association. It is not like the case of a member of a firm paying a cheque drawn in favour of the firm in to his private account. In such a case the bank would be put upon inquiry. Underwood could have produced precisely the same result by paying the cheques in to the Company's account with King & Co., and then drawing out the proceeds and paying them in to his own account with the defendants, and if he had done so no objection could have been taken to the action of the defendants in subsequently allowing him to draw the money out. It is well settled that persons dealing with a limited company in a matter which is within the company's powers are not bound to inquire whether all the preliminaries to the exercise of those powers have been properly done. For instance where an Act authorizes a railway company to purchase land for extraordinary purposes a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes. The only condition is that he must act bona fide and without notice of any illegality: *Eastern Counties Ry. Co.* v. *Hawkes.* (1) Lord Cranworth there said that "it could be no answer to an action for iron rails bargained and sold that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value." So in *Royal British Bank* v. *Turquand* (2), where the plaintiff declared against a joint stock company on a bond signed by two directors under the seal of the company, a plea that the directors were by the registered deed of settlement authorized

(1) (1855) 5 H. L. C. 331, 350. (2) (1856) 6 E. & B. 327.

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to borrow on bond only such sums as should be authorized to be borrowed by a general resolution of the company, and that no such resolution had been passed authorizing the making of the bond sued on, was held bad on demurrer, the obligee having a right to presume that there had been such a resolution at a general meeting. Bankers who have funds of a company in their hands may lawfully honour the cheques of the directors of the company without being bound previously to inquire whether the persons pretending to sign as directors have been duly appointed in conformity with the articles of association: *Mahony* v. *East Holyford Mining Co.* (1) Persons dealing with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have: *Biggerstaff* v. *Rowatt's Wharf.* (2) If Underwood was acting within the authority given him by the articles it is immaterial that he intended to use that authority fraudulently for his own benefit, provided the defendants did not know it. In *Hambro* v. *Burnand* (3) an agent had a written authority from certain underwriters to underwrite policies in their names. Acting within the terms of that authority he issued a policy guaranteeing the repayment to the plaintiffs of a sum of money advanced by them to a certain company. At the time of issuing the policy the agent, who had an interest in the company, knew that it was insolvent, and issued the policy fraudulently for his own purposes and not in the interest of his principals. It was held that the principals were nevertheless liable to the plaintiffs, and that it made no difference that at the time of advancing the money they did not know of the existence of the agent's written authority. Similarly, in *Lloyd* v. *Grace, Smith & Co.* (4) the House of Lords held that a principal is liable in tort for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for that of the agent.

(1) (1875) L. R. 7 H. L. 869.
(2) [1896] 2 Ch. 93.
(3) [1904] 2 K. B. 10.
(4) [1912] A. C. 716.

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Upjohn K.C., *J. B. Matthews K.C.* and *Stranger* for the respondents. For the contention that Underwood had the authority of the company to deal with the cheque the defendants rely mainly upon art. 71 of Table A. But that article gives no authority to a sole director to pay the company's cheques into his private account. It only authorizes him to conduct the business of the company, and for that purpose to do what is necessary. But it is not necessary for the conduct of the company's business that he should pay its cheques into his own account. No doubt a company can have a banking account in the name of an individual, but it must be the company's account. There must be no intermixture of the company's money with the director's, for otherwise it would be a hopeless task for the auditors to find out which items in the account belonged to the company and which to the director. Sect. 113 of the Act of 1908, which deals with the powers and duties of auditors, throws a light on art. 71 of Table A. It provides that: "Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company" for the purpose of enabling them to make a report to the shareholders on the accounts and the balance sheet. With reference to that section the author of Buckley on Companies (1) says: "The Act by implication requires that there shall be annually an audit of the accounts resulting in a balance sheet to whose accuracy the auditors shall speak," a requirement which would be futile if the director might pay the company's money in to his own account. Secondly, even if Underwood had the authority of the company to pay in the cheques as he did, in so paying them in he did not in fact act under that authority. He did not hold himself out to the bank as being the agent of the company, but as being the company, that is to say as principal, who owned all the shares. Cases have been referred to as showing that the Court is not entitled to inquire into the agent's motive. But an inquiry whether an agent was acting with a particular motive is one thing, an inquiry whether a person was acting as an agent at all is another.

(1) 10th ed., p. 272.

In *Hambro* v. *Burnand* (1) there was no question but that Burnand was acting as agent and not as principal. So far as Hambro was concerned he held himself out as agent for the names. Thirdly, even if Underwood was acting within the apparent scope of his authority the defendants were put upon inquiry, which was not the case in *Hambro* v. *Burnand* (1): see per Romer L.J. (2) In *London Joint Stock Bank* v. *Simmons* (3) Lord Herschell said: "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicion aside without further inquiry." Here Mr. Bromley Martin, the manager of the defendant bank, admitted that it was contrary to the rule of banking practice to collect for a director cheques payable to the company without first referring to the company, but the defendants made no such inquiry. They ought to have inquired whether the company had a banking account of its own, but they did not. In *Ross* v. *London County Westminster and Parr's Bank* (4) it was held that a banker to whom a private customer handed for collection a cheque payable to and indorsed by a public official was put upon inquiry whether the customer was entitled to the cheque, and acted negligently if he credited the customer with the proceeds without inquiry. With regard to the nature of the inquiries which in such circumstances the defendants ought to make Lord Hatherley in *Mahony* v. *East Holyford Mining Co.* (5) said: "All those ordinary inquiries which mercantile men would, in the course of their business make, I apprehend, would have to be made on the part of the persons dealing with the company." In the case

(1) [1904] 2 K. B. 10.
(2) Ibid. 25.
(3) [1892] A. C. 201, 221.
(4) [1919] 1 K. B. 678.
(5) L. R. 7 H. L. 869, 895.

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of the cheques which were crossed the defendants are not under the circumstances entitled to the protection of s. 82 of the Bills of Exchange Act. The onus is on the defendants to establish that they acted "without negligence." Those words "without negligence" mean "without want of reasonable care in reference to the interest of the true owners, the principals whose authority the customer purports to have": per Kennedy J. in *Hannan's Lake View Central* v. *Armstrong & Co.* (1) In *Bissell & Co.* v. *Fox & Co.* (2) the plaintiff's traveller paid in to his own account certain cheques received by him drawn to the plaintiffs' order, indorsing them without their authority "per pro B. & Co.," and it was held that the bank had not received payment without negligence. The five cheques numbered 16, 21, 25, 28, 30, 32 and 34, were not cheques within the meaning of s. 82. They correspond to Class 8 of the instruments in *Capital and Counties Bank* v. *Gordon* (3), which were drawn in favour of the plaintiff and crossed payable only upon signature by the payee of a form of receipt at the foot, and not drawn upon the appellants, and with respect to which Lord Lindley said: "These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act," not being unconditional orders to pay on demand.

Then if the defendants are liable for conversion of the cheques the measure of the damages is their face value. The general rule in an action for conversion is that the measure of damages is the value of the thing converted. The only exception to that rule is where the defendant has an interest in the thing converted. The fact that Underwood applied a substantial portion of the proceeds in purchasing goods for the company is immaterial. It is no ground for reducing the damages that a portion of the property converted has been returned to the plaintiff by some person other than the defendant, which was the case here, unless it be shown that he returned it on the defendants' behalf.

Stuart Bevan K.C. replied. *Cur. adv. vult.*

(1) (1900) 16 Times L. R. 236. (2) (1885) 53 L. T. 193.
(3) [1903] A. C. 240, 252.

1924. Jan. 30. The following written judgments were delivered :—

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Bankes L.J. The facts in this case are not seriously in dispute. The real issue between the parties is as to the true inference to be drawn from those facts, and the fate of this appeal depends, in my opinion, upon what the true inferences are. The material facts are as follows : [His Lordship then stated the facts as above set out, and proceeded as follows :] One defence relied on by the appellants was that on those facts there was no evidence of any conversion of the cheques. Unless the appellants can justify their action upon one or other of the defences upon which they rely they appear to me quite clearly to have been guilty of a conversion of all the cheques—so clearly that it does not seem necessary to discuss the decisions in the cases of *Arnold* v. *Cheque Bank* (1) ; *Fine Art Society* v. *Union Bank of London* (2) ; *Morison* v. *London County and Westminster Bank* (3) ; and *Bissell* v. *Fox* (4) ; to which we were referred. One of the two other defences referred to above related only to the crossed cheques, and it was said that whatever might be the position with regard to the other cheques, the appellants were protected with regard to these cheques by s. 82 of the Bills of Exchange Act, because they received payment for these cheques in good faith, and without negligence. The appellants' good faith is not challenged, but it is said, and the learned judge accepted the view, that they failed to make good their contention that they acted without negligence. In this view of the facts I entirely agree, and I will refer to the facts relevant to this point when dealing with the remaining defence of the appellants, which is the only one which, in my opinion, admits of serious discussion. That defence is founded on the rule laid down in the cases of *Royal British Bank* v. *Turquand* (5) and *Mahony* v. *East Holyford Mining Co.* (6) Part of that rule is conveniently stated by

(1) (1876) 1 C. P. D. 578.
(2) (1886) 17 Q. B. D. 705.
(3) [1914] 3 K. B. 356.
(4) (1884) 51 L. T. 663.
(5) 6 E. & B. 327.
(6) L. R. 7 H. L. 869.

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Lindley and Kay L.JJ. in *Biggerstaff* v. *Rowatt's Wharf*. (1) Lindley L.J. says: "Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether, according to the constitution of the company, the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power." Kay L.J. says: "Mr. Davy, therefore, did nothing ultra vires of a managing director; and it would be extraordinary if a person dealing bona fide with the managing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly." If this was the whole of the rule I think that there is a good deal to be said for the contention put forward on behalf of the appellants that Underwood in doing what he did was not acting outside the apparent scope of his authority as conferred upon him as sole director by the memorandum and articles of his company. Strange as it might appear that he should act as he did, it appears to me to be conceivably possible that in so acting he should have been acting honestly, and in the interest of his company, in the carrying out of their business. The fact that the company were overdrawn at their bankers, with the result that the proceeds of the cheques, if collected by them, would not have been available for current expenses, or for some

(1) [1896] 2 Ch. 93, 102, 106.

particular purchase, might be a legitimate reason for paying the cheques in to some other than the company's account. It does not appear to me material, on this point, that Underwood was in fact acting in fraud of his company. The strangeness of his conduct, however, in my opinion, is material not only upon the issue of negligence, but also because it brings into operation what appears to me to be an undoubted branch of the rule of law upon which this defence of the appellants rests. In *Mahony* v. *East Holyford Mining Co.* (1) Lord Hatherley states the whole rule thus : "And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons when they find that there is an act done by a company, will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would, in the course of their business make, I apprehend, would have to be made

(1) L. R. 7 H. L. 869, 894.

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on the part of the persons dealing with the company." To the same effect is the passage in the judgment of Lindley L.J. in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1), where he says: "Here the directors may make any quorum they like—it may be two, or it may be three. They did apparently appoint three. The mortgage in question is under the seal of the company, signed by two directors, and countersigned by the secretary. Now, what could anybody think of that? What is there to put them upon enquiry? What is there to give them notice of anything irregular, if there was anything irregular."

Applying Lord Hatherley's language to the facts of this case I ask myself what are the ordinary inquiries which mercantile men would, in the course of their business, have made on presentation of these cheques for collection? On the assumption that the appellants' cashiers were acting in entire good faith in taking in these cheques without any inquiry whatever, the conclusion seems to me almost irresistible that for some reason or another they considered that they were still dealing with Underwood, the old customer, the principal, and not with a new Underwood, an agent. As, however, the appellants are relying on a rule of law applicable only to dealings with an agent they must take the rule as they find it, and if they have omitted, as I am clearly of opinion they have omitted, to make an ordinary inquiry they must take the consequences. Now, what are the facts? The cheques were plainly, on the face of them, the property of the company. They were indorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to me to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid in to Underwood's private account. Many of the cheques were marked in a way which, of itself, ought to have put the cashiers on inquiry. I entirely accept the view of the learned judge with regard to the conduct of the cashiers, and I think his conclusion establishes not only negligence on their part, but such an absence of ordinary

(1) [1895] 1 Ch. 629, 636.

inquiry as to disentitle the appellants from relying on a defence founded on the ostensible authority of Underwood. I feel satisfied that the obvious inquiry whether the company had not got its own banking account would have put a stop to the fraudulent system adopted by Underwood, and I do not think that it lies in the mouth of the appellants to say that an inquiry would have been useless. In *In re Alms Corn Charity* (1) Stirling L.J. quotes a decision of Lord Romilly with approval, in which he said: "With respect to the argument, that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith* (2), that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

For these reasons I think that the appeal fails, and must be dismissed with costs, though I agree that the form of the order should be varied by including an inquiry into the points mentioned by Scrutton L.J. in his judgment. This will enable the question of the proper measure of damages to be fully considered, a point upon which I express no opinion.

Scrutton L.J. This action was brought, nominally by A. L. Underwood & Co., Ld., substantially by Lloyds Bank (3), a holder of debentures issued by that company, against the Bank of Liverpool and Martins for converting certain cheques the property of the plaintiff company. The connection of the defendant bank with these cheques was that A. L. Underwood, who was the sole director of the plaintiff company,

(1) [1901] 2 Ch. 750, 762.
(2) (1841) 1 Hare, 43, 55.
(3) King & Co. had been absorbed by Lloyds Bank.

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paid them in to his private account at the defendants' bank for collection, having as sole director of the company indorsed them "A. L. Underwood, Ld.: A. L. Underwood, Sole Director." The defendant bank collected them, paid the proceeds in to A. L. Underwood's account, and honoured cheques drawn against them. A. L. Underwood owned 10,001 shares of the 10,002 into which the capital of the company was divided, his wife owning the remaining share. The plaintiff company had issued debentures to a substantial amount to the predecessors of Lloyds Bank, with whom they had a large overdraft. While there were questions as to whether A. L. Underwood had not applied all or part of the proceeds of those cheques in meeting liabilities of his company to third parties, and what the legal effect of such a transaction was, and while there may be questions whether as to some cheques he was paying himself a debt which the company owed him, there is, I think, no doubt that, as between the plaintiff company and Underwood, as a general rule, Underwood was defrauding the plaintiff company, for he made no entries in the company's books which would reveal the nature of his dealings with the property of the company, or show for what purpose he was paying cheques made payable to the company in to his private account; and the only motive for these omissions must have been the desire to conceal transactions he knew to be improper. If, as appears to be the fact, A. L. Underwood converted the cheques of the company, I think the authorities show that the defendant bank by collecting those cheques and placing the proceeds to A. L. Underwood's private account, converted them as against the plaintiff company. There is, no doubt, considerable difficulty in defining the limits of conversion, where servants or agents do ministerial acts in relation to the goods converted in good faith and on behalf of the apparent owner. The different statements of the law by Blackburn and Brett JJ., in advising the House of Lords in *Hollins* v. *Fowler* (1) are proof of this, while it is difficult to reconcile

(1) (1875) L. R. 7 H. L. 757.

Consolidated Co. v. *Curtis* (1), where the auctioneers who in good faith sold certain property on the instructions of the apparent owner and delivered it to the purchasers, were held to have converted that property, with *National Mercantile Bank* v. *Rymill* (2), where auctioneers, who after the apparent owner had placed goods on their premises for sale, but had himself sold them to a purchaser, received the price from the purchaser and gave him a delivery order for the goods, were held not to have converted the goods. Lord Chelmsford, however, in *Hollins* v. *Fowler* (3) states the position thus: "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." Now bankers who collect borrow from their customers the proceeds when collected, and in collecting exhaust the operation of the cheque. These operations have been held to be conversion in such cases as *Kleinwort* v. *Comptoir National d'Escompte de Paris* (4); *Arnold* v. *Cheque Bank* (5); *Fine Art Society* v. *Union Bank of London* (6); and by Lord Reading in this Court in *Morison* v. *London County and Westminster Bank.* (7) Unless therefore the defendant bank can show some excuse in law, they are guilty of conversion.

Their first line of defence was that as Underwood was acting within his apparent authority, the fact that he was using that authority for his own benefit was immaterial, "the apparent authority was the real authority:" see per Lord Macnaghten in *Bryant, Powis & Bryant* v. *Quebec Bank* (8); and for this purpose they relied on such cases as *Hambro* v. *Burnand* (9) and *Lloyd* v. *Grace, Smith & Co.* (10) In my view the distinction between these cases and the present is that in the cases cited the apparent agent was purporting to create privity between the plaintiffs and his principal by doing an act which it was within his apparent authority to

(1) [1892] 1 Q. B. 495.
(2) (1881) 44 L. T. 767.
(3) L. R. 7 H. L. at p. 795.
(4) [1894] 2 Q. B. 157.
(5) 1 C. P. D. 578.
(6) 17 Q. B. D. 705.
(7) [1914] 3 K. B. 356, 364.
(8) [1893] A. C. 170, 180.
(9) [1904] 2 K. B. 10.
(10) [1912] A. C. 716.

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do, and the fact that he did it for his own benefit which he had no actual authority to do, was immaterial as against the plaintiff who purported to contract with the alleged principal on the faith of the agent's apparent authority. If an agent with a general authority in writing to sell houses sells as agent his principal's house to a third party after production of his authority, it would be useless for the principal to assert that his agent was really selling on his own behalf intending to put the money in his own pocket. "The apparent authority is the real authority." So in the present case, if the bank were purchasing the cheques for value, apart from any question of the Bills of Exchange Act, on finding from the company's documents that the sole director had authority to indorse cheques on their behalf, it would be immaterial whether he was using that power for his own benefit, and privity would be created between the alleged principal and the bank, so that the property would pass. But in the present case A. L. Underwood in asking the bank to collect and pay the proceeds into his private account was not purporting in this transaction to act as agent for his company, or to create privity between them and the bank, he was acting and purporting to act for himself as principal. Just as you cannot ratify the act of an agent who did not profess to act for you: *Keighley, Maxsted & Co.* v. *Durant*(1), so in my view you cannot rely on the apparent authority of an agent who did not profess in dealing with you to act as agent. This line of defence, in my opinion, fails.

The next line of defence was under s. 82 of the Bills of Exchange Act, which protects bankers who in good faith and without negligence collect crossed cheques for a customer who has no title to them. This defence does not avail the bank for those cheques which are not crossed, nor for those documents which though in form cheques are not unconditional promises to pay, because the order to pay is conditional on a receipt on the cheque being signed by the payee. It is not disputed that the defendant bank acted in good faith, but it is said, and the judge has found, that they acted

(1) [1901] A. C. 240.

negligently, because they received for collection on behalf of a servant of a company, for his personal account, cheques made payable to the company. The test of the standard of duty in such cases is stated by Lord Dunedin in *Commissioners of Taxation* v. *English, Etc., Bank* (1) to be "the ordinary practice of bankers." On this the learned judge had the evidence of Mr. Bromley Martin, who was the London manager of the defendant bank, and who appears to have given his evidence with great frankness and fairness. He admitted that in all ordinary cases where an official of a company was paying cheques made payable to the company in to his private account, the bank would make inquiries and consult the employer, but he said that where the official was a sole director of a one-man company, and himself the one man, it would not be necessary, partly, I think, because he treated such a director as the same as his company, partly because he thought that inquiry of such an employer would give no good result, for it would be answered by the official whose conduct was inquired into. I cannot take this view; the defendant bank did not know there were no independent shareholders, and there was in fact an independent debenture holder whose interests would be affected; and inquiries of Mr. Underwood himself, as to whether the company had its own banking account, might easily have had considerable effect. If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire. I agree with Roche J.'s view that the bank were guilty of negligence, and I refer to the similar view taken in similar circumstances by Kennedy J. in *Hannan's Lake View Central, Ld.* v. *Armstrong & Co.* (2) and by Bailhache J. in *Ross* v. *London County Westminster and Parr's Bank.* (3) A further item in the finding of negligence is that some of the cheques were crossed "Account of payee," one with the addition of the word "only." While this addition does not affect the

(1) [1920] A. C. 683, 689.
(2) (1900) 5 Com. Cas. 188.
(3) [1919] 1 K. B. 678.

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negotiability of an order or bearer cheque, I agree with the view of Rowlatt J. in *House Property Co.* v. *London County and Westminster Bank* (1), that when such a cheque is paid into the account of a person who is not the payee the bank is put on inquiry, especially when he is a servant of the payee. In the present case no inquiry at all was made by the bank or its cashiers. The general defences to liability for conversion therefore fail.

There remains the question of the form of the account. The bank desired to say (1.) that as to some of the cheques the sole director had used them to pay himself debts due from the company to him, (2.) that as to some of the cheques the sole director had used the proceeds to pay liabilities of the company, and that they ought to have credit for these matters in reduction of damages. It was argued for the plaintiffs that the measure of damages in conversion was always the face value of the cheque, and that what happened afterwards was immaterial, unless it amounted to accord and satisfaction. I am not disposed to decide this in the absence of knowledge of the particular facts. Willes J. in *Edmondson* v. *Nuttall* (2) states the measure of damages to be that the plaintiff recovers all he has lost by the defendant's wrongful act: see also *Plevin* v. *Henshall.* (3) If there is a conversion and redelivery, the redelivery goes in mitigation of damages. Byles J. thought that you could not mitigate damages for conversion of a bag of money by showing that the defendant had out of the bag of money converted paid the debt of the plaintiff. But I am not sure that the learned judge had in his mind the equitable doctrines under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments: see *Bannatyne* v. *MacIver* (4); *Reid* v. *Rigby & Co.* (5) To see whether these principles are applicable, it is desirable that the exact facts should be ascertained. Unfortunately, the judgment as drawn does not clearly provide for this. I think the

(1) (1915) 84 L. J. (K. B.) 1846.
(2) (1864) 17 C. B. (N. S.) 280, 294.
(3) (1833) 10 Bing. 24.
(4) [1906] 1 K. B. 103.
(5) [1894] 2 Q. B. 40.

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inquiry should be to report (1.) as to whether any of the cheques claimed for were indorsed in order to repay debts due from the company to A. L. Underwood, (2.) as to whether the proceeds of any of the cheques converted were used to discharge liabilities of the company, and if so under what circumstances. The Court will then be in a better position to see whether there are any facts which can be used to reduce liability or damages. The order must be varied to this effect. As however the appellants have substantially failed the appeal, subject to this variation, must be dismissed with costs.

Atkin L.J. I agree that this appeal should be dismissed, and substantially for the reasons given by the learned judge below. It is unnecessary to recapitulate the facts. The story, unfortunately, is not uncommon. An official of a limited company has fraudulently taken cheques belonging to the company, which he had authority to indorse, paid them in to his own bank, and converted the proceeds. The cheques were drawn in favour of the company, some were not crossed, some were crossed, and some marked "Not negotiable." The bank are sued by the company for the conversion of the cheques, and in my opinion are liable. The question seems to turn upon whether A. L. Underwood, the official in question, the sole director of the company, had authority, actual or ostensible, to deal with the cheques as he did. I treat the contention that in the absence of authority in Underwood what was done by the bank did not amount to a conversion as unarguable. The bank so disposed of the chattels, the cheques, as to deprive both themselves and the true owners of the dominion over them, and in exchange for the pieces of paper constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion.

The first question is: Had Underwood actual authority to deal with the cheques as he did? The judge has found that he was pursuing a general course of fraudulent dealing with all the accompaniments of fraud, concealment and

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falsification of books. He was, in fact, defrauding the company's bankers, who had granted an overdraft on the security of a floating charge, which covered the assets represented by the cheques. He was using the proceeds of the cheques in question to pay his own private debts. Under ordinary circumstances actual authority appears to be clearly negatived. Nevertheless it was contended that the fact that Underwood was the sole director, and practically the sole shareholder, gave him, in pursuance of the articles, actual authority. He was entrusted with all the powers of the company, the company can only act through its directors, and the directors, or director if only one, could do what they willed with the company's assets. If this means anything it means that a board of directors acting as such have actual authority to defraud the company by using the company's assets to pay debts due to butchers or moneylenders by the individual directors. Such an act is quite outside the class of acts—management of the company's business—authorized to be done by the board. The directors, whether collectively or singly, have not actual authority to steal the company's goods.

If, then, there was no actual authority the question remains whether Underwood was acting within the scope of his apparent authority in such circumstances that the company would be precluded from setting up lack of actual authority. I think he was not. The company's case upon this point was destroyed by the result of the cross-examination of the London manager of the defendant bank by Mr. Upjohn, one of the most effective examples of the art which I have read, though no doubt assisted by the transparent candour of the witness. I will read two passages. At p. 120 of the shorthand notes he was asked: "In the ordinary course of business the manual possession by a manager or secretary, or managing director of a cheque or suchlike document, belonging to a company, is as agent of and on behalf of the company? (A.) In an ordinarily constituted company, yes.—(Q.) No, I am not putting to you an ordinarily constituted company, but under ordinary circumstances? (A.) Well, yes, I agree under ordinary circumstances.—

(Q.) And under ordinary circumstances if a managing director or secretary uses or attempts to use such a cheque as I have put to you for his own purposes by paying it into his own private account, that is wrong? (A.) Certainly.—(Q.) A wrong towards the company? (A.) Certainly." At p. 125 of the shorthand notes he was asked this: "It would be negligence on the part of the bank to collect for a customer's private account cheques made payable to his principal. Do you agree with that? (A.) Yes—without asking the principal first—without referring to the principal.—(Q.) You qualify it by 'without referring to the principal'? (A.) Yes. —(Q.) This is another branch of the same rule, that it would be negligence on the part of a bank to take a cheque made payable to a limited company for the credit of the private account of one of the company's officials? (A.) My answer to that is exactly the same as the last—yes, it would be negligence without referring to the principal.—(Q.) Without referring to the company? (A.) Without referring to the company. (Mr. Justice Roche) He agrees entirely with your rule, and he comes back to his first statement that he treats this as an exception. (Mr. Upjohn) Yes. (To the witness) No doubt there is a business reason for that, is there not? (A.) An obvious one.—(Q.) Because there is so great a risk that the official of the company, having, by virtue of his position, control over the cheques or bills, or whatever it may be, belonging to the company, is using it for a wrong purpose when he pays it to his private account? (A.) He may be using it for a wrong purpose.—(Q.) I put it that there is a risk that he is, or may be doing wrong? (A.) Yes.—(Q.) I think you will agree with me that at all events such a transaction, that is to say, the payment to the private account of the official of the company of a cheque which, on the face of it, is made payable to the company, is out of the ordinary course of business? (A.) Yes." These admissions, fortified by the whole facts of the case, appear to demonstrate that in disposing of the cheques as he did Underwood was not acting within the ordinary scope of his authority, but was doing something unusual which ought to

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have attracted the attention of the bank's servants. It was said that if inquiries had been made Underwood could easily have made a lying explanation, which would have set at rest any doubts. I agree with the judge that even if well founded this would be an insufficient answer, but I think it more than doubtful whether Underwood could have given a satisfactory answer to the obvious question: Has not the company a banking account, and, if so, why are not these cheques paid into that account? Even if the first transaction so investigated went through it is unlikely that similar disposition of the cheques would have been repeated. It is further to be noticed that the bank cannot rely upon any apparent authority of Underwood to deal with the cheques on behalf of the company, for he neither purported to do so, nor did the bank ever suppose that they were dealing with the company. The transaction on both sides was treated, as in fact it was, as a dealing for Underwood's private account. Had it been otherwise the lack of actual authority founded on fraud was not apparent, for the bank undoubtedly acted throughout honestly, and the case would more nearly have approached the circumstances of *Hambro* v. *Burnand*. (1) In that case, however, the appellant defendants had not seen, or asked to see, the actual authority of the agent, which was in writing; but as the act done would have been within the apparent authority given in the document they were held to be protected. In this case the bank must be taken to have seen the authority, inasmuch as it is contained in the memorandum and articles of association, with which they are bound to be acquainted. The effective distinction is that in the present case the act done was not within the apparent authority given by the articles. The true conclusion seems to be, therefore, that the bank converted the cheques in question, unless they are protected in the case of the crossed cheques by the provisions of s. 82 of the Bills of Exchange Act, 1882. On this point I have nothing to add to what was said by the learned judge. On the admitted facts it seems to me impossible to find that he was wrong in coming to the

(1) [1904] 2 K. B. 10.

conclusion that the bank had not satisfied him that they had dealt with the cheques without negligence. The only remaining question is as to the scope of the inquiry directed by the learned judge. As drawn, the order is too narrow to adjust satisfactorily the rights of the parties. The order is limited to the state of account between Underwood and the company at the date of the payment in to the bank account of each of the cheques in question, and was drawn in that form for the purpose of enabling the judge to decide whether or not it could be said that Underwood had implied authority so to deal with the particular cheque. If he had there would be no conversion of that cheque. I say nothing as to what inference should be drawn if at the time of paying any cheque in to the bank account the balance of account, as between Underwood and the company, should be in favour of the company. That will be determined by the learned judge after report. But the defendants are also entitled to have it determined whether any part of the proceeds of the converted cheques was applied by Underwood in the payment of liabilities of the company. To the extent to which the proceeds were so applied it appears to me at present, without formally deciding the point, that the prima facie measure of damages, the face value of the cheques, must be reduced. I agree with the order proposed.

Appeal dismissed.

A. L. UNDERWOOD, LIMITED *v.* BARCLAYS BANK.

The action was for conversion by the defendants, with whom A. L. Underwood had a banking account, of seven cheques, amounting in all to 2241*l.* 17*s.*, the property of the company, and was brought by the plaintiffs in the interest of a debenture holder, Lloyds Bank, to whose predecessors, Messrs. H. S. King & Co., a mortgage for 9000*l.* by way of floating charge over the assets of the business had been issued to secure the repayment of an advance. The cheques in question, which were paid in by Underwood to the credit of his account with the defendants, were all drawn in favour of the company and indorsed

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in the same manner as those in the action against the Bank of Liverpool and Martins—"A. L. Underwood, Ltd. A. L. Underwood, sole director." They were all crossed, two of them, one for 1140*l.* and the other for 400*l.*, being also marked "not negotiable." The facts of the case were substantially the same as in the *Bank of Liverpool Case*, and the evidence in that case as to the formation of the company, the terms of the articles of association, and the position of Underwood as sole director was treated as given in this case, the only substantial distinction between the two cases being that here the defendants' main contention was that they took the cheques as holders in due course. In that connection the evidence was that immediately upon the cheques being paid in the defendants credited Underwood with the amounts, in the sense that they made a credit entry in their ledger to that effect, but there was no agreement between the defendants and Underwood that he should be allowed to draw against those cheques before they were cleared, nor did he in fact draw against them until after the defendants had received the proceeds from the paying banks; while on the paying-in slips which accompanied the payment in of some of the later cheques there appeared the following note: "The Bank reserves the right at its discretion to postpone payment of cheques drawn against uncleared effects which may have been credited to the account." The defendants set up the alternative defences that, if they were not holders in due course, but were acting as collecting bankers, Underwood when paying in the cheques to his own account was acting within the apparent scope of his authority as sole director, and further that they were entitled to the protection of s. 82 of the Bills of Exchange Act, 1882. The arguments relied on in support of these alternative defences were the same as those put forward in the *Bank of Liverpool Case*.

Roche J. gave judgment for the plaintiffs.

The defendants appealed.

Schiller K.C. and *Micklethwaite* for the appellants. The defendants took these cheques in good faith and for value

without notice of any defect in Underwood's title, and being holders in due course could not be guilty of conversion. They gave value for the cheques in two respects: First, Underwood's account at the time of the payment in was in debit, and the pre-existing debt was sufficient consideration to give the bankers a good title to the cheques: *Currie* v. *Misa*. (1) Secondly, the defendants credited Underwood in their ledger with the amounts of the cheques as soon as they were paid in. That fact of itself made them holders for value. It was not necessary that Underwood should have drawn against the cheques before the defendants received the proceeds. In *Capital and Counties Bank* v. *Gordon* (2), where the bankers were held not to have received the cheques as agents for collection, by reason of their having credited the customer with the amounts as soon as they were handed in, it is true that the customer was allowed to draw against the cheques before they were cleared, but the bankers there would have been equally disentitled to the protection of s. 82 if the customer had not so drawn. The placing of a cheque by a banker to the credit of his customer, even where the cheque is post-dated, makes the banker a holder for value: *Royal Bank of Scotland* v. *Tottenham* (3); *Ex parte Richdale*. (4) In the latter case Brett L.J. said that the cheque was delivered by the customer "in order that the amount of it might be at once placed to his credit, and the bankers placed it to his credit and became immediately holders of the note for value." It is enough that the customer, by having the cheque placed to his credit in the ledger, has the opportunity of drawing against it, whether he in fact draws against it or not. In *Akrokerri (Atlantic) Mines* v. *Economic Bank* (5) Bigham J. indeed held that a banker who credited his customer in the ledger with the amount of a cheque before it was cleared was not thereby deprived of the protection of s. 82, but there the customer had special notice "that cheques would not be paid against until cleared," whereas here Underwood had no such

(1) (1875) L. R. 10 Ex. 153.
(2) [1903] A. C. 240.
(3) [1894] 2 Q. B. 715.
(4) (1882) 19 Ch. D. 409.
(5) [1904] 2 K. B. 465.

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notice—at all events in respect of the earlier cheques. This contention that the crediting of the customer at once makes the banker a holder for value is not negatived by the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), which provides that "a banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." It is generally understood that that Act was passed to get rid of the decision in *Capital and Counties Bank* v. *Gordon* (1), where the bankers by allowing the customer to draw against the cheques became purchasers of them; in other words, the Act is regarded amongst bankers as having enacted that the fact of the bankers having bought the cheque is not inconsistent with their collecting the proceeds on behalf of the customer within s. 82. Secondly, the defendants took the cheques without notice of any defect in Underwood's title. The mere fact that the cheques were drawn in favour of the company was not enough to arouse the defendants' suspicions. A distinction must be drawn between the case of a new customer and an old one whom they had every reason to trust and whom they knew to be the owner of all the shares.

Upjohn K.C., *J. B. Matthews K.C.* and *Stranger* for the respondents. Two of the cheques, for 1140*l.* and 400*l.* respectively, being more than two-thirds of the total amount claimed, were marked "not negotiable." Therefore the defendants could not get a better title to them than their customer Underwood had to give. That disposes of the defendants' claim to be holders for value of those cheques. With respect to the other cheques the mere fact of crediting the customer in the bank books does not make the bank a holder for value. In all the cases in which the crediting of the customer has been held to have that effect there was a specific agreement. In *Royal Bank of Scotland* v. *Tottenham* (2) Lord Esher M.R. expressly pointed out that: "When the bank received the cheque from Mrs. Monson, they did so

(1) [1903] A. C. 240. (2) [1894] 2 Q. B. 715, 717.

on an undertaking to give her credit to the amount of the cheque on her general account." So too in *Ex parte Richdale* (1) there was an understanding that credit should be given at once. In *Capital and Counties Bank* v. *Gordon* (2) the customer drew against the cheques by arrangement with the bank. But not only did the defendants not hold these cheques for value, they took them with notice of the defect in Underwood's title. They are precluded from setting up the contrary by the "per pro" indorsement. They ought to have inquired into Underwood's authority to deal with the cheques.

The indorsement of a bill of exchange expressed to be by procuration is a notice to the indorsee that the party so indorsing professes to act under the authority of a principal, and imposes on the indorsee the duty of ascertaining that the party so indorsing is acting within the terms of his authority: *Alexander* v. *Mackenzie* (3), *Attwood* v. *Munnings* (4); *Stagg* v. *Elliott* (5); and per Lord Macnaghten in *Bryant, Powis & Bryant* v. *Le Banque du Peuple*. (6)

Cur. adv. vult.

1924. Jan. 30. The following judgments were delivered :—

Bankes L.J. In the case of *A. L. Underwood, Ld.* v. *Barclays Bank* I have not written a judgment, and for this reason. It is quite true that the number of cheques there in question was much less than the number of cheques in the *Bank of Liverpool Case*, but in my opinion on that part of the case there is no material distinction between the two. The one issue which is peculiar to *Barclays Bank Case* is that in that action the bank set up the case that they were holders for value of the cheques. Upon that issue the learned judge decided upon the facts that they failed to make out their case. I agree with the learned judge's view, and I agree with the reasons which are given by my brothers in support

(1) 19 Ch. D. 409.
(2) [1903] A. C. 240.
(3) (1848) 6 C. B. 766.
(4) (1827) 7 B. & C. 278.
(5) (1862) 12 C. B. (N. S.) 373, 381.
(6) [1893] A. C. 170, 177.

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of that view. Under these circumstances I have not thought it necessary to write a judgment, but my opinion is that this appeal also fails and must be dismissed with costs.

Scrutton L.J. read the following judgment: The appeal in the case of *A. L. Underwood, Ld.* v. *Barclays Bank* arises in a case where the plaintiff company were claiming that the defendant bank had converted certain cheques, the property of the plaintiffs, indorsed in blank on behalf of the company, by A. L. Underwood, the sole director of the plaintiff company, and paid into his private account at the defendant bank. The defendants here raise a point which was not raised in the *Bank of Liverpool Case*. They say that by crediting the cheques in their account with Underwood, before the cheques were cleared, they became holders for value in good faith and without notice of the cheques as against Underwood and the true owner, and have therefore a good title to the cheques. This defence does not apply to two cheques crossed "not negotiable," which cover 1540*l*. of the total claim of 2241*l*. 17*s*. The cases where an agent for collection becomes a holder for value must turn on an express or implied agreement between bank and customer, that the latter may draw against the cheques before they are cleared. Roche J. has not been satisfied that there was any such agreement, and I do not differ from him. There was certainly no express agreement. Though the cheques were in fact credited to the customer's account before they were cleared the customer was not informed of this, and I can see nothing to prevent the bank from declining to honour the cheque, if the payment in against which it was drawn had not been cleared. The bank cashiers did in fact use their discretion, varying with each customer as to whether they would or would not anticipate clearance in paying, but I can see no evidence from which to infer a binding agreement with the customer on the subject. None of these cheques were in fact drawn against before clearance. In fact after Barclays had absorbed the London and Provincial Bank, with whom Underwood had at first his account, there appears in the Barclay form of paying-in slip

the note: "The Bank reserves the right, at its discretion, to postpone payment of cheques drawn against uncleared effects which may have been credited to the account." This date is before the paying in of the last of the cheques claimed for in this case. I cannot therefore interfere with the refusal of Roche J. to find that the defendants were holders for value, and it is unnecessary to consider whether the form of indorsement gives them notice, so as to put them on inquiry as to defects.

Regarding the defendant bank as agents for collection its defences are the same as in the case of the Bank of Liverpool, and fail for the same reasons. The order for an inquiry should be in the same form as in the *Bank of Liverpool Case*, and the appeal must be dismissed with costs.

Atkin L.J. read the following judgment: In this case the facts and issues are substantially the same as in the previous case, with the exception that Barclays Bank contend that they were holders for value of the cheques paid into their account, inasmuch as the amounts of the cheques were credited to the customer's account on the day on which they were paid in. If holders for value, they say that the plaintiffs have not established that the bank took the cheques with notice of the defect of title. It is unnecessary to consider the question as to notice of a defect of title, for in my opinion the bank fail to show that they were holders for value. The cases have been discussed and I do not refer to them again. I think it sufficient to say that the mere fact that the bank in their books enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection does not without more constitute the bank a holder for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will before receipt of the proceeds honour cheques of the customer drawn against the cheques, Such a contract can be established by course of business and may be established by entry in the customer's pass book, communicated to the customer and acted upon by him. Here

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there is no evidence of any such contract. No cheque paid in was ever drawn upon until cleared; and the form of paying-in slip in respect of some of the later cheques seem to indicate that the bank assumed that they had not entered into any such contract. That the course of banking business requires entries to be made forthwith in the ordinary course of business is well known, and no doubt led to the passing of the Bills of Exchange (Crossed Cheques) Act, 1906, passed in consequence of the decision in *Capital and Counties Bank* v. *Gordon*. (1) But neither that decision nor the statute lay down the rule, judicial or statutory, that if a bank credits a cheque at once in its books that fact without more makes the bank a holder for value. Under these circumstances the present case cannot be distinguished from the case against the Bank of Liverpool and Martins, and the same result must follow.

Appeal dismissed.

Solicitors for the appellants in *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins*: *Linklaters & Paines.*

Solicitors for the appellants in *A. L. Underwood, Ld.* v. *Barclays Bank*: *Durrant Cooper & Hambling.*

Solicitors for the respondents in both appeals: *John Bartlett & Son.*

(1) [1903] A. C. 240.

J. F. C.

[IN THE COURT OF APPEAL.]

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Feb. 13, 14.

BEATTY *v.* BEATTY.

Foreign Judgment — Enforcement — Judgment for Payment of Alimony — Inability of Foreign Court to vary its Judgment as to overdue Instalments — Final Judgment — Action for Arrears in this Country.

By the law of the State of New York, where a judgment has been pronounced by the proper Court of that State for the payment of alimony, and instalments under that judgment are due and in arrear, it is not competent for that Court to vary its judgment in respect of the instalments so accrued due:—

Held, that such a judgment is in that respect a final judgment, and an action may be brought to enforce payment of those arrears in this country.

Decision of Horridge J. reversed.

APPEAL from Horridge J.

The action was brought by the former wife of the defendant G. W. Beatty to recover a sum of 818*l.* 19*s.* 4*d.*, being the balance due under a judgment pronounced by the Supreme Court of the State of New York in a matrimonial suit between the parties dated October 19, 1911, as amended by an order of the same Court dated October 4, 1912. The former judgment decreed the marriage to be dissolved. It was silent as to the payment of alimony, but provided that "the plaintiff have leave to apply for a modification of this decree in case of any event materially changing the circumstances of the parties." In January, 1912, the plaintiff, who had been a linotype operator at a salary of twelve dollars a week, lost her position and was unable to secure other employment. She accordingly moved the Court to modify its decree by making an order for the payment to her by the defendant of alimony, and on October 4, 1912, the Court amended its judgment by ordering "that the defendant pay to the plaintiff the sum of twenty dollars a week as and for the support and maintenance of the issue of the said marriage and of the plaintiff." The order then directed that the plaintiff should have liberty to apply for a further modification of the decree in the event of change of circumstances, and concluded with the words: "And it is further ordered that the said final judgment

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as hereby amended shall be and is the final judgment of this Court in this action." There had accrued due under the said amended judgment up to the date of action 208 weekly instalments amounting to 4160 dollars, of which amount the defendant had paid 360 dollars and no more. The action was brought in December, 1915, to recover the balance above stated. The defence traversed the fact of the judgment and its amendment, and alleged that it was obtained by false evidence and suppression of material facts constituting a fraud on the Court.

On December 2, 1921, an order was made for the issue of a commission for the examination of witnesses on the plaintiff's behalf in New York, the trial of the action being stayed until the return of the commission. The evidence of the witnesses was duly taken under the commission in October, 1922. On the action coming on for trial before Horridge J. on April 26, 1923, the depositions of the New York witnesses were not tendered in evidence, and the defence of fraud was abandoned. No evidence was given to show that the judgment sued on was a final judgment. In the absence of that evidence his lordship assumed that the rule of the New York Court was the same as that obtaining in this country—namely, that an action will not lie to recover arrears of alimony as a debt due. He accordingly dismissed the action. The plaintiff appealed. When the case came before the Court of Appeal the plaintiff's counsel drew the Court's attention to a decision of the American Supreme Court, *Sistare* v. *Sistare* (1) as showing that Horridge J. was wrong in thinking that the judgment sued on was not a final judgment. The Court adjourned the case to allow of the parties obtaining evidence as to the effect of a judgment for alimony according to the law of New York. On February 13, 1924, the parties returned to the Court of Appeal without having obtained the necessary expert evidence, and invited the Court to decide the question on their own view of the terms of the judgment sued on coupled with the American decision above referred to, and to that invitation the Court acceded.

(1) (1910) 218 U. S. 1.

Clement Davies (*Wingate Saul K.C.* with him) for the appellant, relied on *Sistare* v. *Sistare*. (1) There an action was brought in the State of Connecticut to recover past due instalments of alimony under a judgment of the Court of the State of New York. It was there held by the Court of Connecticut that the action could not be maintained. On error being brought to the Supreme Court of the United States that judgment was reversed. It was held that the settled doctrine in New York was that a Court which had pronounced a judgment for alimony had no power to modify that judgment as to past due instalments; that such a judgment was final and, as such, was "entitled to the protection of the full faith and credit clause of the Federal Constitution," that is to say that it could be enforced by action in another State. In that respect judgments for alimony in the State of New York differ from similar judgments in this country.

[No reliance was apparently placed by counsel on the depositions which had been taken in New York, but Bankes L.J., on reading through those depositions, found one by a Mr. Vine Smith, a practising New York attorney, to the effect that according to the law of New York a judgment for alimony was a final judgment in the sense that it could be sued upon in other States, notwithstanding that the Court which pronounced it had power to modify it as regards future obligations.]

Sir H. Maddocks K.C. and *Moresby* for the respondent. To constitute a final judgment which is capable of being sued upon in this country it must be final in the sense that it cannot be altered at all. *Sistare* v. *Sistare* (1) only decided that a New York judgment for alimony could not be amended in respect of the amount already accrued due. It can be altered as regards future payments, and that is sufficient to deprive it of finality. In the cases in which a foreign judgment is sued upon the judgment is tendered merely as evidence of a debt: *Nouvion* v. *Freeman*. (2) But it is essential to the conception of a debt that it should be assignable, and alimony cannot be assigned; therefore the judgment of a foreign Court

(1) 218 U. S. 1. (2) (1889) 15 App. Cas. 1.

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for alimony cannot be enforced here by action. In *Harrop* v. *Harrop* (1) an order of a Judicial Commissioner of the State of Perak that the defendant should pay to the plaintiff, his wife, a certain sum per month for the maintenance of the plaintiff and a child of the marriage was held to be not final and conclusive within the doctrine of English law which enables judgments of foreign Courts to be enforced in this country. And in *In re Macartney* (2) an affiliation order made by the Court of Appeal in Malta was held to be not final and conclusive as to the amount payable. In *M'Donnell* v. *M'Donnell* (3), in a suit brought by a wife against her husband for maintenance in a District Court of the State of Montana, an order was made that the defendant should "pay into the office of the clerk of the Court the sum of forty dollars per month for the support and maintenance of the plaintiff, such payments to be made until the further order of the Court." On an action being brought in Ireland for arrears due under the order the King's Bench Division held that the order was not such a final and conclusive judgment as to be enforceable in the Irish Courts. But even if arrears due under a judgment for alimony can be sued for, the judgment must show upon the face of it what is the precise amount to be recovered, which is not the case here, for evidence would have to be given to show the precise number of weeks for which the instalments are unpaid. In *Sadler* v. *Robins* (4) a decree of the Court of Chancery in Jamaica ordered the defendant to pay a certain sum of money to the plaintiff, first deducting thereout the defendant's costs to be taxed by the proper officer. On an action being brought here on that decree, before the costs had been taxed, it was held that the action could not be maintained, as the decree was in an incomplete state.

Counsel for the appellant were not called on to reply.

BANKES L.J. This is an appeal in an action on a specially indorsed writ brought by the former wife of William George

(1) [1920] 3 K. B. 386.
(2) [1921] 1 Ch. 522.
(3) [1921] 2 I. R. 148.
(4) (1808) 1 Camp. 253.

Beatty, from whom she had been divorced. The claim was for 818*l.* 19*s.* 4*d.* due upon a judgment of the Supreme Court of the State of New York dated October 19, 1911, as amended by an order of the said Court dated October 4, 1912. The particulars are given as amount due at the rate of twenty dollars per week, less a certain sum paid on account, leaving the balance above stated. The defendant put the judgment in issue. Under these circumstances it became necessary for the plaintiff to establish that the judgment sued on was a final judgment, and for that purpose evidence was taken on commission of an American lawyer, who deposed that the judgment in question was, according to the law of the State of New York, a final judgment and enforceable as such. On the case coming on for trial before Horridge J., for some reason which I do not understand the evidence of that lawyer was not referred to, nor were any of the reported American decisions on the subject cited, and in the absence of that evidence the learned judge decided that the judgment was not final. When the case came before this Court in the first instance the evidence of the American lawyer was still not referred to, and we adjourned the hearing in order that the plaintiff might obtain some evidence as to the finality of the judgment. Then the case came back before us again, and still the necessary evidence was not forthcoming, but we were invited by the parties to dispense with any evidence and to decide the matter on our own view of the judgment coupled with an American decision in *Sistare* v. *Sistare* (1) to which our attention was called. The judgment in the present action was a judgment in a suit for divorce instituted by the lady in the Court of New York whereby it was adjudged that the marriage was dissolved, and it concluded with this provision: "It is ordered and adjudged and decreed that the plaintiff have leave to apply for a modification of this decree in case of any event materially changing the circumstances of the parties and for such other and further relief as may be just and proper to grant." On July 5, 1912, notice of motion was

(1) 218 U. S. 1.

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given for an application to the Court to modify the judgment by directing payment of alimony, and on that motion coming before the Court on October 4, an order was made varying the judgment of October 19, 1911, by including in it a clause in these terms: "It is ordered adjudged and decreed that the defendant pay to the plaintiff the sum of twenty dollars a week as and for the support and maintenance of the issue of the said marriage and of the plaintiff." Then followed a clause as to the plaintiff having leave to apply for a modification of the decree, in the same terms as in the original judgment. Then there is a clause at the end: "It is hereby further ordered that the said final judgment as hereby amended shall be and is the final judgment of this Court in this action." The question is whether the judgment of October, 1911, as so amended is a final judgment in the sense that an action can be maintained in this country to recover arrears of alimony due under it. I wish at once to point out the distinction between this action and the attempts which have on more than one occasion been made to sue in the King's Bench Division on an order for the payment of alimony made by the English Divorce Court, a proceeding which it has been held cannot be allowed. By the law of this country an order for the payment of alimony can be varied at any time at the discretion of the Court that made it, not only with regard to future payments but also with regard to past instalments which have accrued due and are in arrear. On that ground Grove J. in *Bailey* v. *Bailey* (1) refused to allow judgment to be signed for arrears of alimony under Order 14. "It may well be," he said, "that there are cases in which the Court might interfere with respect to future but not with respect to past payments; but no case has been cited to shew that the Divorce Court has not the power to interfere with respect to past payments." In *Robins* v. *Robins* (2) Joyce J. took the same view that an order for permanent alimony is not a final judgment; he said: "It still remains subject to the control of the Divorce Division, which may vary it from time to time, and there is

(1) (1884) 13 Q. B. D. 855, 857. (2) [1907] 2 K. B. 13, 17.

a discretion even as to arrears." But although that is the rule in this country it is otherwise in the State of New York. It seems clear, not only from the evidence of the American lawyer but also from the decision of the Supreme Court of the United States in *Sistare* v. *Sistare* (1), that by the law of the State of New York it is not permissible for the Court to interfere with accrued instalments of alimony, though it may vary its order with respect to future payments. If that be so it seems to be plain that the judgment sued on in the present case is a final judgment, and that the action can be maintained. Sir Henry Maddocks indeed contended that to constitute a final judgment within the meaning of the rule it must be so complete and final that it cannot be varied by any means. For that proposition there is no authority, and the mere fact that a foreign judgment may be sued upon even though it is under appeal at once conclusively disposes of it.

There are two cases which were cited to us, and to which I wish to refer. The Irish case *M'Donnell* v. *M'Donnell* (2) at first sight seems to afford some support to the contention that arrears of alimony due under a foreign judgment cannot be sued for here. But when that case is examined it is plain that no evidence as to the foreign law was given, and the majority of the Court decided the case in the way they did on the assumption that the law of the State of Montana in which the order for alimony was pronounced was the same as the law of this country, from which assumption it followed that the order sought to be enforced was not a final order. The same observation applies to the decision in *Harrop* v. *Harrop*. (3) The law on the subject is clearly and concisely summarized in the headnote to that case: "In order that a foreign judgment may be enforceable in an English Court it must be a final and conclusive judgment of the Court by which it was pronounced, and it is not a final and conclusive judgment of that Court if an order has to be obtained in that Court for its enforcement"—which is not the case here—"or if on application to that Court for an order to enforce it

(1) 218 U. S. 1. (2) [1921] 2 I. R. 148.
(3) [1920] 3 K. B. 386.

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the original judgment is liable to be abrogated or varied "—which in the present case it is not—"but it is not prevented from being a final judgment by reason of the fact that it may be the subject of an appeal to a higher Court." I think that this appeal must be allowed and judgment entered for the plaintiff.

SCRUTTON L.J. In this case an action was brought by Mrs. Beatty for 818*l.* 19*s.* 4*d.* alleged to be due under a judgment of the Supreme Court of the State of New York. The defence, while formally denying the existence of the judgment, pleads that it was obtained by fraud, but no evidence of that fraud was given in the Court below. The judgment, it appears, was for alimony. The learned judge. from whose judgment the present appeal is brought, being very familiar with the practice of the English Divorce Court, according to which actions cannot be brought on orders for the payment of alimony because such orders are not final judgments, took the view that this judgment of the Court of New York was not a final judgment in the sense that an action can be brought upon it. For some reason which I do not understand the learned judge was not referred to the expert evidence that had already been taken in New York to the effect that according to the law of that State this was a final judgment. On an appeal being brought to this Court we were informed that a decision of the Supreme Court of the United States in a case of *Sistare* v. *Sistare* (1) was in conflict with the learned judge's view, and we thereupon adjourned the hearing in order that evidence as to the law of New York in this respect might be given in the ordinary way. Again, for some reason which I do not understand the legal advisers of the parties returned to this Court without the necessary evidence, and proposed to discuss the effect of the decision in *Sistare* v. *Sistare.* (1) But the question as to what is the law of a foreign State on a particular matter is treated in our Courts as a question, not of law, but of fact. We are not entitled to look at an American report, and say on the

(1) 218 U. S. 1.

authority of that report that the American law is so and so. It must be proved by the evidence of experts in that law. Under those circumstances the question arose, What was this Court to do? The regular course would have been to send the case down for retrial in order that evidence of the facts might be given, but we were not desirous of putting the parties to further expense, and we asked them to agree to this Court deciding the matter as arbitrators on the materials before it, and in that way we are now deciding it. Whether the effect of that will be that our decision will be of no authority as a reported case is a matter on which I express no opinion.

Is then this judgment of the Court of New York a final judgment which this Court will enforce on an action being brought for the purpose? The principle which we have to apply was thus stated by Lord Herschell in *Nouvion* v. *Freeman* (1): "I think that in order to establish that such a judgment has been pronounced"—that is a final judgment which this Court can enforce—"it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and, upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt." That statement of the principle, however, although very widely expressed, must not be understood as meaning that the fact that a judgment may be reversed on appeal, and that an appeal is even pending at the time, makes the

(1) 15 App. Cas. 1, 9.

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judgment the less final, if it is final in the particular Court in which it was pronounced. What then is the evidence as to the effect of this judgment in the State of New York where it was pronounced? In England, as I have said, an order for the payment of alimony is not a final judgment within the rule, for it is always open to the Court to vary its order even in respect of instalments already accrued due, and if that had been the position in New York this order could not now be sued upon. But the evidence of the New York lawyer and the decision in *Sistare* v. *Sistare* (1) show that in the State of New York, when an order for alimony has been made and instalments have accrued due, the Court has no power to vary that order as regards the instalments so in arrear, however much the position of the parties may have changed, and the order in respect of those arrears is a final judgment.

But it was said that a judgment, even though it cannot be varied, is not final in the sense that it can be enforced by action, unless it appears on the face of the judgment itself what is the amount to be sued for, and that, as the order in this case was to pay at the rate of twenty dollars a week, you have first to ascertain the number of weeks that the instalments have been in arrear and do an arithmetic sum to arrive at the amount due. I cannot accept that contention. No doubt a judgment to be final must be for a sum certain. But a sum is sufficiently certain for that purpose if it can be ascertained by a simple arithmetical process. We were referred to a case of *Sadler* v. *Robins* (2), where the judgment was to pay 3370*l.* 1*s.* 9¼*d.*, first deducting thereout the defendant's taxed costs in the suit, and it appeared that no attempt had been made to get the costs taxed. Lord Ellenborough ruled that until taxation there was no final judgment, but both he and the Court in banc said that when once the costs had been taxed there would be a final judgment which could be enforced, because nothing would remain to be done except to subtract the amount allowed in taxation from the 3370*l.* 1*s.* 9¼*d.*

It was, however, suggested that there are certain recent

(1) 218 U. S. 1. (2) 1 Camp. 253.

decisions which go to show that this action is not maintainable. In *In re Macartney* (1), where the action was for arrears due under an affiliation order made by the Court of Appeal in Malta, Astbury J. held that the judgment was not final and conclusive. He did so on the evidence of an expert in Maltese law that the maintenance awarded by the judgment might be varied from time to time or terminated, according to the circumstances of the child. But as it did not appear whether he was referring only to future maintenance, or also to instalments already due, I must take it that that case was decided on the principle applicable to an English order for alimony—namely, that a power to vary the order prevents it from being final even as regards arrears. The same observation applies to the judgment of Sankey J. in *Harrop* v. *Harrop* (2), where no evidence was given that the Court of the State of Perak had no power to alter its order as to accrued instalments. And *M'Donnell* v. *M'Donnell* (3) proceeded on the same grounds, that there was no evidence as to the law of the State of Montana, and the Court expressly said that in the absence of evidence as to the foreign law they took the order of the foreign Court to be analogous to our orders for alimony, and to be liable to variation whether instalments had accrued or not. None of those cases therefore are in conflict with the view we are here taking. For these reasons I agree that the appeal should be allowed.

SARGANT L.J. In this case we are dealing with the matter on fuller materials than were brought to the attention of the learned judge below. In the first place Bankes L.J. has found in the depositions which were taken on commission in New York direct expert evidence as to the law of that State; and secondly the parties have agreed to our looking at a certain reported American decision, and forming the best opinion we can, in the capacity I think of arbitrators, as to what that law is. Now the evidence of the expert and the decision in *Sistare* v. *Sistare* (4) seem to me to establish that

(1) [1921] 1 Ch. 522.
(2) [1920] 3 K. B. 386.
(3) [1921] 2 I. R. 148.
(4) 218 U. S. 1.

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orders for alimony in the State of New York differ from similar orders in this country in this respect, that they are final and unalterable as regards arrears accrued due. Therefore the effect of an order for alimony in that State is that it affords clear evidence of a definite debt, and as such, in accordance with what was laid down by Lord Herschell in *Nouvion* v. *Freeman* (1), it can be enforced by action. It was said indeed that it does not appear on the face of the order itself that any definite sum was due. But I think that the maxim "Id certum est quod certum reddi potest" applies; and if by the application of a little simple arithmetic it can be ascertained that at the date of action brought a definite sum was due and in arrear, it seems to me that this is as final and conclusive an order for the payment of that particular sum as if there had been a definite order for the payment of a named sum on a future date. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant: *Watkins, Pulleyn & Ellison.*
Solicitor for the respondent: *E. H. Coopman.*

(1) 15 App. Cas. 1.

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[IN THE COURT OF APPEAL.]

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NIXON *v.* ERITH URBAN DISTRICT COUNCIL.

Corporation—Contract not under Seal—Executed Consideration—Work done at Request of Corporation—Housing Scheme—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *Part III., s.* 56—*Housing, Town Planning, etc., Act*, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 1.

By s. 56 of the Housing of the Working Classes Act, 1890 (the carrying into execution of which Act is now made compulsory on all local authorities under s. 1 of the Housing, Town Planning, etc., Act, 1919), the local authority may, for the purpose of carrying it into execution, "exercise the same powers whether of contract or otherwise as in the execution of their duties . . . . in the case of sanitary authorities under the Public Health Acts . . . ." (sic):—

Held, that the words of that section must be read distributively, and as meaning that if the local authority's district is an urban district it shall have the same power of contracting that an urban sanitary authority has under the Public Health Acts, and if its district is a rural district the power which a rural sanitary authority has under those Acts, with the result that in the former case the authority cannot, when acting under the Housing of the Working Classes Act, 1890, contract otherwise than under its common seal if the value or amount of the contract exceeds 50*l.*

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury.

The plaintiff's claim was for 1150*l.*, money due for work done by him for the defendants as quantity surveyor at their request. The defendants, who were the housing authority for the district under the Housing Acts, 1890 to 1919, had prepared a scheme under s. 1 of the Housing, Town Planning, etc., Act, 1919, Part I., which amends Part III. of the Housing of the Working Classes Act, for the erection (inter alia) of 79 pairs of houses of a type suitable for the working classes.

The question of the preparation of quantities and specifications relating to these houses was considered at a meeting of the defendants' Housing and Town Planning Committee held on March 8, 1921, and a resolution was passed that it be left to their architect "to appoint whatever additional temporary assistance he deems necessary, or alternatively to

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instruct a firm of quantity surveyors to prepare the same." This resolution was adopted and confirmed by the defendants at a Council meeting held on March 30, 1921. The architect then instructed the plaintiff to supply the necessary specifications and bills of quantities, and agreed with him (as Bailhache J. found in fact in his judgment in the case) that his remuneration should be at the rate provided by General Housing Memorandum No. 31 of the Ministry of Health dated July 8, 1920. The plaintiff did the work and the defendants advertised for tenders for building based upon his quantities and specifications, the lowest tender being accepted. Afterwards, owing to the action of the Ministry of Health, the defendants abandoned this part of their scheme, and when the plaintiff sent in his account they informed him that his charges were excessive, and that upon this and other grounds they were not prepared to pay.

The plaintiff thereupon issued the writ in this action, the only defence here material being that as there was no agreement under the common seal of the defendants the plaintiff could not recover. The defendants paid 50*l.* into Court with a denial of liability.

Bailhache J. held that the effect of s. 56 of the Housing of the Working Classes Act, 1890 (1), was to restrict the defendants' power of contracting to the extent provided by

(1) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III., s. 56: "Where this part of this Act has been adopted in any district, the local authority shall have power to carry it into execution . . . . and for that purpose may exercise the same powers whether of contract or otherwise as in the execution of their duties in the case of the London County Council under the Metropolis Management Act, 1855, and the Acts amending the same, or in the case of sanitary authorities under the Public Health Acts, or in the case of the Commissioners of Sewers under the Acts conferring powers on such Commissioners" (sic).

By the Housing, Town Planning, etc., Act, 1919, s. 1, sub-s. 1: "It shall be the duty of every local authority within the meaning of Part III. of the Housing of the Working Classes Act, 1890 . . . . to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of this Act . . . . to prepare and submit to the Local Government Board a scheme for the exercise of their powers under the said Part III."

s. 174 of the Public Health Act, 1875 (1), and that as the amount of their contract exceeded 50*l.* and was not under seal, the contract was void and the plaintiff could not recover.

The plaintiff appealed.

Schiller K.C., *J. G. Hurst K.C.* and *Mulligan* for the appellant. Upon the rule of the common law that a corporation can only contract under its common seal a series of cases ending in *Lawford* v. *Billericay Rural Council* (2) have engrafted an exception that where work is done at the request of the corporation, which work is necessary for carrying out the purposes for which the corporation was incorporated, the absence of a seal is no answer to an action for payment for the work so done. No doubt that exception does not apply where there is a statutory prohibition against a corporation contracting otherwise than under seal. There is such a prohibition in s. 174 of the Public Health Act, 1875, with respect to contracts made by an urban authority under that Act, but that prohibition has no application to the present case. This contract was not made under the Public Health Act, for a sanitary authority has no power under that Act to provide housing. And the effect of s. 56 of the Act of 1890 is not, as Bailhache J. held, to impose upon an urban authority acting under that Act the same restrictions that it is under when acting under the Public Health Act, for it gives the local authority all the powers "of sanitary authorities under the Public Health Acts," drawing no distinction between urban and rural sanitary authorities. The section must be construed therefore as giving to the local authority the widest powers that any such sanitary authority has, and a rural sanitary authority under the Public Health Act, not being within the prohibition of s. 174, has the power in cases coming within the common law exception to contract without a seal. There being no statutory prohibition against the defendants

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed; namely, (1.) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority."

(2) [1903] 1 K. B. 772.

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contracting without a seal when acting under the Act of 1890 the present action can be maintained.

Montgomery K.C. and *W. Allen* for the respondents were not called upon.

BANKES L.J. This is an appeal from a judgment of Bailhache J. in an action brought by a quantity surveyor to recover the fees alleged to be due to him under a contract whereby he was employed on behalf of the defendants, the Erith Urban Council, to take out the necessary quantities in connection with a building scheme for the erection of houses for the working classes. The plaintiff was in fact engaged by the defendants' architect, and it was not disputed that the architect had authority to employ him, but the defendants relied upon the defence that the contract of employment, being for an amount exceeding 50*l.*, was not under seal, as required by the provisions of the Public Health Act, 1875. In my opinion the question whether that is a good defence depends upon the construction which ought to be put upon s. 56 of the Housing of the Working Classes Act, 1890. The object of Part III. of that Act, in which the section occurs, was to confer a new jurisdiction and new powers upon the four different local authorities mentioned in the First Schedule thereto in their respective districts, that is to say in an urban sanitary district the urban sanitary authority, in the City of London the Commissioners of Sewers, in the County of London the London County Council, and in a rural sanitary district the rural sanitary authority. The object of the statute was to confer on each of those authorities a power of erecting in their particular area houses for the working classes. The last mentioned—namely, rural sanitary authorities—were placed under the obligation of obtaining the consent of their county council before they could exercise the power, but the other three authorities were authorized to exercise it as and when they thought fit. Then s. 56 provides as follows: "Where this part of this Act has been adopted in any district, the local authority shall have power to carry it into execution . . . . and for that purpose may exercise the

same powers whether of contract or otherwise as in the execution of their duties in the case of the London County Council under the Metropolis Management Act, 1855, and the Acts amending the same, or in the case of sanitary authorities under the Public Health Acts, or in the case of the Commissioners of Sewers under the Acts conferring powers on such Commissioners." That section is no doubt not well drafted, but its obvious intention, as I read it, is to give each one of those local authorities within their particular district the same power of contracting as they have when executing their duties under the particular Act of Parliament applicable to their case, that is to say they may exercise the same powers as the London County Council may exercise under the Metropolis Management Act, or sanitary authorities may exercise in their districts under the Public Health Act, and so on. If that is the proper interpretation the powers given to each authority are not cumulative, in the sense that any one authority may exercise all the powers that any of the other authorities possess under their respective Acts, but each authority is given separately in connection with its new power of erecting working-class houses the same powers of contracting that it already possessed for the purpose of carrying into execution its existing duties under the Act specially appropriate to its case. But it is said that the section does not distinguish between the two classes of sanitary authorities, and that it should be read as meaning that urban and rural sanitary authorities should have the same powers that either of those authorities has in its own particular district. With that contention I cannot agree. I think the section should be read distributively, as dealing with each class of sanitary authority separately, and conferring on it, when acting under the Housing of the Working Classes Act, the powers of contracting or otherwise which it has when acting under the Public Health Act. Then if that be so it follows that an urban authority, when acting under the Housing of the Working Classes Act, has no power to contract for an amount exceeding 50*l.* except under seal. In my opinion the appeal fails.

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SCRUTTON L.J. I am of the same opinion. The claim is by a quantity surveyor for his remuneration for work done in taking out quantities for the Erith Urban Council, who were carrying out a housing scheme which involved the building of 79 pairs of houses. The defendants say that they are not liable to pay, as there was no contract with the plaintiff under seal. The question is purely one of law—namely, whether the provision of the Public Health Act, that an urban council cannot contract for a sum exceeding 50*l.* otherwise than under seal, applies to a contract made by an urban council for the purpose of carrying out a scheme for building working-class houses. Now the powers of an urban council to deal with this matter begin with the Act of 1890, which allows the local authorities specified in the First Schedule thereto to adopt Part III. of the Act, and empowers them to make a scheme under it. The First Schedule provides that the local authorities for the purpose of Part III. are in an urban sanitary district the urban district council, in the county of London the London County Council, in the City of London the Commissioners of Sewers, and in a rural sanitary district the rural district council. Those being the local authorities for the purposes of Part III., s. 56 defines their powers. [His Lordship read the section.] That section is very elliptically framed, but I think it means this, that the local authority, where it is the London County Council, may exercise the same powers that the county council may exercise in the execution of their duties under the Metropolis Management Act; where it is a sanitary authority it may exercise the powers that a sanitary authority may exercise in the execution of its duties under the Public Health Act; where it is the Commissioners of Sewers it may exercise the powers that the Commissioners of Sewers may exercise in the execution of their duties under the Acts conferring powers on such Commissioners. If that is the true meaning of the section the powers of the urban sanitary authority to make a contract when acting under the Housing of the Working Classes Act are subject to the restriction imposed by s. 174 of the Public Health Act, which requires that every contract by

an urban authority the amount of which exceeds 50*l.* must be sealed with its common seal, and according to the decision of the House of Lords in *Young & Co.* v. *Leamington Corporation* (1) it makes no difference in that respect that the authority has had the benefit of the work done under the contract. Mr. Schiller has argued that s. 174 of the Public Health Act only applies to contracts made under that Act, and that there are decisions that if a local authority is acting under some other Act the requirement that its contracts should be under seal has no application. Thus in *Douglass* v. *Rhyl Urban Council* (2), where the defendants, when making improvements to a pier, were acting under powers given by certain local Acts, it was held that s. 174 did not apply, and that as they had had the benefit of the work done by the plaintiff, an engineer whom they had employed in connection with the improvements, the absence of a contract under seal was immaterial. But although the defendants in the present case were not acting under the Public Health Act, the Housing of the Working Classes Act, under which they were acting, expressly provides that they should have the same powers of contract as if they were, thereby subjecting them to the limitations of s. 174. I agree that the appeal must be dismissed.

SARGANT L.J. I am of the same opinion. In my judgment everything turns on the proper construction to be put on s. 56 of the Housing of the Working Classes Act, 1890. The difficulty of construing it is not diminished by the fact that it is extremely elliptical and somewhat ungrammatical. But it seems to me that it can hardly be disputed that as between the London County Council and the Commissioners of Sewers on the one hand and the sanitary authorities on the other the section must be read distributively, that is to say the London County Council is to have the powers conferred upon it by the Metropolis Management Act, and the Commissioners of Sewers are to have the powers conferred on them by the statutes appropriate to them; and if that be so there seems to be little difficulty in reading the section distributively as

(1) (1883) 8 App. Cas. 517. (2) [1913] 2 Ch. 407.

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between the two classes of sanitary authorities under the Public Health Act—namely, urban sanitary authorities and rural sanitary authorities. Therefore the section seems to provide that the powers under the Act of 1890 are to be exercised by urban authorities in the same way that urban authorities are required to exercise their powers under the Public Health Act, and subject to the limitations imposed by the latter Act. It follows that the plaintiff is no more entitled to recover on his contract of employment in the present case than he would have been if the contract had been made under the Public Health Act, in which case he would have been out of Court by reason of the contract not being under seal.

Appeal dismissed.

Solicitors for the appellant: *Webster & Webster.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for John Atkinson, Erith.*

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Nov. 23; *Dec.* 19.

JAY AND ANOTHER *v.* JAY AND ANOTHER.

Limitation of Action—Tenant for Life—Damage to Real Estate—Obligation to repair—Permissive Waste—Action by Remainderman—Equitable Remedy—Limitation—Civil Procedure Act, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 2.

The limitations imposed by s. 2 of the Civil Procedure Act, 1833, are not applicable to an action by remaindermen against the executors of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit cum onere, and a Court of equity will not apply to the equitable remedy the limitation contained in s. 2 of the Act as to the time within which the action must be brought.

APPEAL from Epsom County Court.

The following statement of the facts is taken from the judgment of the Divisional Court.

The plaintiffs, who are the owners of certain freehold premises at Epsom, claimed a declaration that one Edwin Jay,

deceased, who was tenant for life of the premises in question, was liable to keep the premises in good tenantable repair; and they claim damages against the defendants, who are his executors, for his failure to carry out his obligations.

Under the will, dated November 6, 1872, of Alfred Smart, deceased, the said Edwin Jay became tenant for life of the freehold premises in question. The will provided that every tenant for life thereunder should keep the property in good tenantable repair.

Mr. Jay, deceased, came into the property in 1907 and let it under a lease to a Mr. Keep, who was under no liability to keep the fences in repair. During Mr. Jay's lifetime the boundary fence was out of repair and was not put right. Mr. Jay died on September 29, 1921, and the present plaintiffs became the owners of the premises. Probate of Mr. Jay's will was taken out on November 2, 1921. This action was not commenced until February 16, 1923, against Mr. Jay's executors—i.e., more than fourteen months after probate of Mr. Jay's will, and the defendants contended that the only action which could be brought against them as executors would be one for damages for permissive waste committed by the late Mr. Jay during his lifetime, and that such action would only lie against them by virtue of s. 2 of the Civil Procedure Act, 1833, and they therefore contended that the action was statute barred, because under that section the action must be brought within six calendar months after the executors have taken on themselves the administration of the estate. The learned judge decided in favour of the defendants. (1)

The plaintiffs appealed.

(1) Civil Procedure Act, 1833, s. 2: "An action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person. . . . ."

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Holman Gregory K.C. and *J. D. Waters* for the plaintiffs.

A. E. Woodgate for the defendants.

The arguments sufficiently appear from the judgment of the Court. The following cases were cited in addition to those referred to in the judgment: *Gregg* v. *Coates* (1); *Batthyany* v. *Walford.* (2)

Cur. adv. vult.

Dec. 19. SANKEY J. read the judgment of the Court as follows [after stating the facts the learned judge continued:] On appeal it was urged that where a tenant for life takes and enjoys property under the terms of a will in this form, the law implies a contract between him and the remainderman, and that, therefore, the 1833 Act does not bar such an action for contract, that, in fact, it has nothing to do with it, that that Act in effect only gave a limited right to bring an action within a certain time against a man's executors in respect of a tort committed by him. A number of cases were cited upon this point, notably *In re Williames.* (3)

To that the defendant replied that although some learned judges had described the relationship between such a tenant for life and a remainderman as in the nature of a contract, it was not really a contract, but that the real position was that equity, when administering the estate of such a tenant for life, would compel him to do the right thing, that is to say, that as he had enjoyed the property he must also discharge the liabilities which equitably fell upon him—he who takes the benefit must also bear the burden—that, therefore, equity would compel the performance of such a condition, but that equity, although in most cases it would not prescribe any period within which it would compel the performance of such an obligation, would always adopt any limitation prevailing at common law enacted by Act of Parliament, and that in this case equity would follow the 1833 Act of Parliament, and bar the remedy, unless it was sought for within the six months: see *Knox* v. *Gye.* (4)

(1) (1856) 23 Beav. 33.
(2) (1887) 36 Ch. D. 269.
(3) (1884) 52 L. T. 41, 44; (1885) 54 L. T. 105, 106, 107.
(4) (1872) L. R. 5 H. L. 656.

Before dealing with the points specifically, we think it desirable to state our view of the law bearing upon the question. Where a tenant for life takes under a will containing a clause such as appears here, the legal doctrine applicable is contained in the well-known maxim, "qui sentit commodum sentire debet et onus et transit terra cum onere." A person who obtains the benefit must also shoulder the burden. When, therefore, a tenant for life takes the advantage but does not shoulder the burden, that is to say neglects to repair, it is possible to regard the cause of action accruing to a remainderman as arising: (1.) out of tort, or (2.) out of an implied contract, or (3.) by reason of a Court of equity compelling the person who has taken the benefit to fulfil the conditions upon which he took it. This is by no means an unprecedented position in our law, for the history of the action for trespass on the case affords a striking example of how a purely tortious remedy was applied to cases of contract.

(1.) As to tort. The action under circumstances like the present would be one for permissive waste for non-repair of the premises. Before the Civil Procedure Act, 1833, such an action would not have survived against the executors of a deceased man; but after that Act there was a limited right to bring such an action, and *Woodhouse* v. *Walker* (1) is an illustration of such an action being successful. In that case the Court treated the action as one of tort, and as it came within the limitations prescribed by the Act, the plaintiff was successful.

(2.) As to contract. There are numerous statements by various learned judges that under circumstances such as the present there is an implied contract to discharge the obligation to repair. In the case of *In re Williames* (2), where there was an equitable tenant for life, Kay J., dealing fully with the case, said: "I must hold that there is a liability on the part of the executor of the deceased tenant for life for such omission to repair as was a breach of that condition or implied contract contained in the will."

(1) (1880) 5 Q. B. D. 404.

(2) (1884) 52 L. T. 41, 44; (1885) 54 L. T. 105, 106, 107.

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Sankey J.

It will be observed that the learned judge puts the liability on two grounds, a breach of condition, or under an implied contract.

In the Court of Appeal it is apparent that the learned Lords Justices in affirming Kay J. put the liability upon the ground of breach of condition. Brett M.R. said: "Courts of equity have recognized that . . . . if by the will of a person, which person may do as he likes with his property, that person confers equitable estates for life upon different persons, or upon one person; and if, after the death of the testator, the person so designated avails himself of the benefit given to him by the will, and if the will in giving that benefit attaches to it a certain burden, which is imposed by the will of the testator, and by the will alone—if the person takes the benefit thus given by the testator, he must acknowledge the liability or burden; and that, if he does not, he has come under an equitable liability which a court of equity will enforce." Baggallay L.J. said: "It is a liability in the nature of an obligation. In my opinion it is not a contract, and not strictly an implied contract." Fry L.J. said: "That personal liability has no doubt been expressed in different phrases. In some cases it has been said to be a condition. In some cases it has been referred to as an implied contract. For myself, I prefer the language used by Bacon V.-C. in the case of *Rees* v. *Engelback* (1), where he said that where it was a personal liability it could be enforced in a court of equity."

Lord Russell C.J. prefers to take the same view in *Blackmore* v. *White* (2), and a similar opinion is expressed in Williams on Executors, 11th ed., p. 1332.

(3.) As to the action arising by reason of a Court of equity compelling the person who has taken the benefit to fulfil the condition on which he took it. The passages already referred to indicate that the Court of Appeal inclined to this view in the case of *In re Williames*, (3)

We regard this as the true view, and if it is, the Civil Procedure Act does not apply. The liability arises by reason

(1) (1871) L. R. 12 Eq. 225, 237. (2) [1899] 1 Q. B. 293.
(3) 52 L. T. 41; 54 L. T. 105, 106.

of the fact that there is a remedy in equity and, as the Master of the Rolls says in *In re Williames* (1): "If that remedy exists in equity, the case, to my mind, is clearly not within the Civil Procedure Act, 1833, because that speaks of actions at law and actions on the case in the nature of actions for waste; and this equitable remedy is not such a case, of course, and is not within the terms of the statute."

We now deal with the points: We are of opinion that it is impossible in a case of this character to say that there is a contract between the tenant for life and the remainderman. It would be extremely difficult to say how it was made, when it was made, or to give it some of the ordinary incidents of a contract. The truer view is that contended for by the defendants—namely, that equity under the circumstances compels the performance by the person who has enjoyed the benefit of the estate of the burden attached thereto. The question then is whether on the passing of the Act of 1833 the period of limitation thereby imposed would have been applied by a Court of equity to the equitable remedy already recognized by which the estate of a tenant for life was, after his death, made liable for his failure to fulfil his obligation to repair. We cannot think it would have been. That Act, as above stated, was an Act dealing with torts committed by a deceased, and prescribed the limitation of six months after his executors shall have taken upon themselves the administration of the estate for suing in respect of them.

The whole tendency of equity in dealing with cases like the present was not to regard the rights of the remainderman as consequent on a tort. Time after time the judges lay it down that the relationship, although perhaps not constituting a contract, was one of a contractual character. The deceased was in no sense regarded as having committed a tort, but having elected to take the benefit, his estate was held liable to bear the burden.

We are of opinion that equity would not have applied the limitations prescribed in the Act of 1833 to such a case.

(1) 52 L. T. 41; 54 L. T. 105, 106.

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Under these circumstances we have reached the conclusion that the learned judge was wrong and that this appeal should be allowed.

TALBOT J. I should like to add a few words with which, I think, Sankey J. agrees upon an argument which was addressed to us by the counsel for the defendants, based upon the judgment of Kay J. in the case of *In re Williames.* (1) In that case the learned judge, whose authority is of course very high, appears to have assumed that the period of limitation prescribed by the Act of 1833 applies to this equitable remedy. There are two reasons why that is not an authority binding upon us. The first is that it appears to have been assumed and not to have been decided. There is no indication that Kay J. applied his mind to this point or that it was contested before him. Secondly, it is directly contrary to the express statement of Brett M.R. in the same case in the Court of Appeal dealing with this very point. A part of the passage has already been read, but I will read it all: "Now, if that remedy exists in equity, the case, to my mind, is clearly not within the 3 & 4 Will. 4, c. 42, because that speaks of actions at law and actions on the case in the nature of actions for waste; and this equitable remedy is not such a case of course, and is not within the terms of the statute. Therefore, the moment the courts of equity recognise the equitable liability, that equitable liability is entirely without the statute."

Appeal allowed.
Action remitted.

Solicitors for plaintiffs: *Calder Woods & Pethick.*
Solicitors for defendants: *Theodore Bell & Co.*

(1) 52 L. T. 41; 54 L. T. 105, 106.

F. C.

[IN THE COURT OF APPEAL.]

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Jan. 14.

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LIVERPOOL DISTRICT REGISTRY.

[1923. U. 2486.]

Practice—Sheriff—Poundage—District Registrar—Taxation—Appeal—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20—*Sheriffs Order*, 1920, *Statutory R. and O.*, 1920, *No.* 1250/L. 36—*Rules of Supreme Court, Order* LXV., *r.* 27.

By s. 20, sub-s. 2, of the Sheriffs Act, 1887, a sheriff may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor with the advice and consent of the judges and the concurrence of the Treasury as therein provided.

By the Sheriffs Order, 1920, made in pursuance of this Act, the fees to be demanded, taken and received by a sheriff are fixed sometimes exactly, sometimes within limits, and sometimes by "the sum actually and reasonably paid"; and it is provided that "the amount of any fees and charges payable . . . . shall be taxed by a Master of the Supreme Court or a District Registrar of the High Court, as the case may be, in case the sheriff and the party liable to pay such fees and charges differ as to the amount thereof":—

Held, by Bankes L.J. and Eve J., that the order was not ultra vires; Scrutton L.J. giving no decision on this point.

Held, by Bankes L.J. and Eve J. (Scrutton L.J. dissenting), that no appeal lies from the decision of a District Registrar fixing the amount of poundage; that his jurisdiction is confined to fixing the amount, and that where the difference between the parties depends on a matter of principle it is to be settled by an action.

Townend v. *Sheriff of Yorkshire* (1890) 24 Q. B. D. 621 approved and followed.

Decision of Acton J. in chambers affirmed.

APPEAL from an order of Acton J. in chambers on appeal from the decision of the registrar of the Liverpool District Registry fixing the amount of poundage due to the Sheriff of Westmorland in the following circumstances:—

On July 31, 1923, the plaintiffs recovered judgment against the defendant for 40,853*l.* 5*s.* 11*d.* including the costs of the action and handed to the Sheriff of Westmorland a writ of fieri facias directing him to levy from the goods of the defendant the amount of the judgment with 2*l.* 2*s.* the costs

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of execution, interest, and sheriff's charges. The sheriff seized household furniture of the defendant to the value of 2159*l.* 16*s.* 6*d.* Negotiations then took place between the plaintiffs and defendant during which the sheriff by the plaintiffs' instructions remained in possession of the goods seized but abstained from advertising a sale. In the result the judgment debt and costs were paid in full and the plaintiffs instructed the sheriff to withdraw, which he did on September 21, 1923, without having sold any of the goods seized. While the sheriff was in possession he received from the defendant a cheque for 2159*l.* 16*s.* 6*d.*, the value of the goods seized. He handed over 1049*l.* 5*s.* 1*d.* the balance after deducting 1110*l.* 11*s.* 5*d.* for his charges and disbursements being 80*l.* 18*s.* 5*d.* for disbursements, and 1029*l.* 13*s.* for poundage on 40,853*l.* 5*s.* 11*d.* principal and 232*l.* 16*s.* 1*d.* interest to September 21, 1923.

The plaintiffs disputed the amount claimed by the sheriff for poundage. The sheriff carried in his bill to the District Registrar, who then gave notice to the sheriff, the plaintiffs, and the defendant to appear before him. At the hearing before the District Registrar on October 18, 1923, the sheriff contended that the plaintiffs had succeeded in recovering the full amount of their judgment, costs, and interest, in all 41,086*l.* 2*s.*, in consequence of the seizure, and that he was therefore entitled to poundage on that amount.

The plaintiffs contended that the sheriff could not be entitled to a larger fee than would have been due to him if he had received no instructions to withdraw; that is to say poundage on the value of the goods seized, 2159*l.* 16*s.* 6*d.*, and on the sum realized—namely, the same sum of 2159*l.* 16*s.* 6*d.*; that is to say, poundage on 4319*l.* 13*s.*

On October 23 the District Registrar gave his decision. He was not satisfied that the recovery of the full amount of 41,086*l.* 2*s.* was due to the seizure, but, leaving that question unanswered, he decided that the sheriff was only entitled to charge poundage on the amount which was actually received by him and accounted for to the plaintiffs, or which after the levy would have been received if the plaintiffs had

not directed him to withdraw. He therefore reduced the charge for poundage from 1029*l.* 13*s.* to 110*l.* 10*s.*, being at the rate of 1*s.* in the pound on 100*l.* and 6*d.* in the pound on the balance of 4219*l.* 13*s.*

The sheriff appealed to the judge in chambers.

Acton J., the judge in chambers, decided on the authority of *Townend* v. *Sheriff of Yorkshire* (1) that no appeal lay.

The sheriff appealed.

Eales for the appellant. The learned judge was wrong in holding that there was no appeal from the decision of the District Registrar. By s. 20, sub-s. 2, of the Sheriffs Act, 1887 (2), a sheriff may receive such poundage as is fixed by the Lord Chancellor with the advice and consent of the judges of the Court of Appeal and the High Court of Justice or any three of them with the concurrence of the Treasury. By an Order of July 8, 1920, made under that section, the sheriff's poundage and fee for delivery of the writ to the under sheriff is to be the same as before until further notice—that is to say, "twelve pence of and for every twenty shillings, where the sum exceedeth not 100*l.*, and six pence of and for every twenty shillings being over and above the said sum of 100*l.*, that he or they shall so levy": see 29 Eliz. c. 4; the Sheriffs Act, 1887, s. 39, sub-s. 5; and the Schedule to the Sheriffs Order of August 31, 1888. The words "shall so levy" mean shall get by seizing: *Mortimore* v. *Cragg* (3); *Alchin* v. *Wells.* (4) The order goes on to provide that the amount payable in case the sheriff and the execution creditor cannot agree, shall be taxed by a Master of the Supreme Court or a District Registrar of the High Court. By the Rules of the Supreme Court, Order XXXV., r. 4, where a cause is proceeding in a district registry all writs of execution shall issue from the district registry and all costs shall be taxed in the district registry; and by r. 9 of that order any person affected by any decision of a District Registrar may appeal to a judge. Further facilities for appeal are provided by Order LXV.,

(1) 24 Q. B. D. 621.
(2) See note p. 849, post.
(3) (1878) 3 C. P. D. 216.
(4) (1793) 5 T. R. 470.

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r. 27 (39), which empowers any party dissatisfied with the decision of a taxing officer to carry in objections to the taxation and have it reviewed, and then by r. 27 (41) the decision of the taxing officer upon review is subject to review by a judge. In *Townend* v. *Sheriff of Yorkshire* (1), the case on which the learned judge based his decision, the only point taken was whether Order LXV., r. 27 (41), applied to a taxation under the Sheriffs Order of August 31, 1888, which is now superseded by the Order of July 8, 1920. Order XXXV., r. 9, was not referred to. If that case is law, then the effect of the Sheriffs Orders of 1888 and 1920 has been to substitute a Master of the Supreme Court or a District Registrar for the Lord Chancellor as the authority to fix the amount of poundage. If so, the orders were and are ultra vires; they contradict the statute under which they were made. The decision has not met with general acceptance. It does not apply where a District Registrar has omitted to allow anything by way of poundage. In that case his taxation may be reviewed: *Madeley* v. *Greenwood.* (2) Assuming it applies where the question is how much should be allowed, it does not apply where a principle is involved and the question is whether anything should be allowed: *In re Beeston.* (3) Where a receiving order has been made against an execution debtor the sheriff's charges are part of the costs of the execution within s. 11, sub-s. 1, of the Bankruptcy Act, 1890 (now s. 41, sub-s. 1, of the Bankruptcy Act, 1914); and accordingly they are liable to taxation under r. 110 of the Bankruptcy Rules, 1915, and the taxation may be reviewed at the instance of the Board of Trade under r. 116, and from the decision on the review an appeal lies to a judge: *Ex parte Jaynes* (4); *In re Hurley.* (5) It is an absurd conclusion that no appeal should lie where the debtor is solvent, but that an appeal should lie when he is on his way to bankruptcy.

Lynskey for the respondents. *Townend* v. *Sheriff of Yorkshire* (1) was rightly decided and governs this case. A right

(1) 24 Q. B. D. 621.
(2) (1897) 42 Sol. J. 34.
(3) (1899) 68 L. J. (Q. B.) 344.
(4) [1892] 2 Q. B. 587.
(5) (1893) 10 Morrell, 120.

of appeal can only be conferred by statute, and there is nothing absurd in the Legislature granting the right in one case and withholding it in another. The Sheriffs Order of 1920, so far from being ultra vires, must have been contemplated by s. 20, sub-s. 2, of the Sheriffs Act, 1887, for it would be impossible for the Lord Chancellor with the help of the judges to fix the exact amount of poundage in every possible case, no matter what obstacles and difficulties the sheriff may find in the way of levying the judgment debt. All that can be done is to fix limits within which the amount allowed for poundage is to lie and leave to some independent tribunal to fix the exact figure according to the facts in each particular case. A District Registrar or a Master of the Supreme Court is appointed as a persona designata to perform this duty, and from his assessment there is no appeal. That was the decision in *Townend* v. *Sheriff of Yorkshire.* (1) Order xxxv. of the Rules of the Supreme Court does not help the appellant. Rule 1 only relates to proceedings down to and including final judgment. Rule 4 relates to matters after final judgment, such as writs of execution and taxation of costs. That means solicitors' costs, but does not include sheriffs' fees and poundage. A sheriff's claim for poundage is not, like a solicitor's bill of costs, a matter arising in the action; it is a separate claim outside the action. The sheriff is neither a party to the original action nor an advocate nor an attorney for a party. He is the King's officer executing the King's writ: *Montague* v. *Davies & Co.* (2) Rule 9 must be read in connection with rr. 1 and 4 of Order xxxv. Order lxv., r. 27, also refers to the taxation of solicitors' costs. A District Registrar or Master of the Supreme Court taxing the amount of fees and charges payable under the Sheriffs Order, 1920, is not giving a final decision. He acts as a valuer or appraiser ascertaining the amount for which the sheriff may sue. The use of the word "tax" introduces the fallacy that the machinery for objecting to, reviewing, and appealing from the taxation of a solicitor's bill of costs is intended to apply to the assessment

(1) 24 Q. B. D. 621. (2) [1911] 2 K. B. 595.

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of poundage. But in the Sheriffs Order, as was pointed out in *Townend* v. *Sheriff of Yorkshire* (1), "tax" means no more than "fix" or "assess."

Eales in reply.

BANKES L.J. This appeal raises a question of jurisdiction. The short facts are that a judgment was recovered by the Union Bank of Manchester for some 40,000*l.* Process of execution followed, and by arrangement between the parties the sheriff's officer remained in possession until the whole amount of the debt was paid. This amount could not have been realized by the execution, because the goods seized were of small value compared with the debt. The sheriff claimed poundage upon the whole amount of the judgment debt, asserting that it was levied as a result of his action. The execution creditor disputed that view and the matter went before the Liverpool District Registrar, not upon any formal summons, but by the sheriff carrying in his bill, and the District Registrar giving notice to the sheriff and the execution creditor to attend before him. After hearing argument he disallowed the sheriff's claim for poundage in respect of any amount above the amount actually realized by the execution; that is to say, the value of the goods seized. From that the sheriff appealed from the District Registrar to the judge in chambers. The question before the learned judge was whether he had any jurisdiction to entertain the appeal. He held that he had not, and from his order an appeal is now made. Having considered the arguments, the statutes, and the rules I have come to the conclusion that no appeal lies from the Registrar. The history of the legislation and orders applicable to the matter commences with the Sheriffs Act, 1887. It must be borne in mind that the sheriff's claim for any fees or charges in respect of services rendered by him in issuing an execution is a claim upon the person who employs him to perform the act, a claim enforceable by action only, apart from any other statutory remedy. The Sheriffs Act, 1887, does not in any way purport to interfere with this position. What s. 20 of that Act deals with is the

(1) 24 Q. B. D. 621.

fixing of the amount which the sheriff shall be entitled to charge. Sub-s. 2 is the material provision: "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff . . . . may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the Judges of the Court of Appeal and High Court of Justice, or any three of them, and with the concurrence of the Treasury." That sub-section deals with the fixing of the fees and poundage which the sheriff may demand, take and receive, and with nothing else. The last Sheriffs Order made in pursuance of that sub-section was the Sheriffs Order of 1920 made under this statute, and it provides for the charges that the sheriff may make in respect of the various kinds of work he has to do, and the distances he has to travel, and so forth, and when it comes to the poundage it provides that the poundage shall be "as before until further order." Now it is obvious that the charges must in every case depend upon the actual amount of the work which the sheriff has to do, and that it would be impossible for the Lord Chancellor, or any one else, to fix the amount which has to be paid in every case in respect of the work to be done. Therefore the order goes on to provide that the amount of any fees or charges payable under this table shall be taxed by a Master of the Supreme Court, or a District Registrar of the High Court, as the case may be, in case the sheriff and the party liable to pay such fees and charges differ as to the amount of them. So although the statute in terms only gave authority to frame an order fixing the amount of the charges, fees, and poundage, yet the order as drafted recognized the fact that the amount could only be fixed, in case of a dispute, by a taxation which took into consideration the amount of the work done. I will take as an illustration an instance under head 8 of the Order, "For sale or preparation for sale by auction." It says "for work actually done in preparing inventory and valuation, compiling catalogue, and preparing for sale, a sum not exceeding four per cent. on the value of the goods if such value does not exceed 200*l*. If the value is

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in excess of that amount, a sum not exceeding four per cent. on the first 200*l.*, and a further sum not exceeding three per cent. on the excess." This method of fixing within limits the fees and charges, providing for a taxation if the parties differ, must of necessity confer on the taxing Master or District Registrar a certain discretion in fixing the actual fee to be paid provided it does not exceed the maximum. It was contended, as it was in *Townend* v. *Sheriff of Yorkshire* (1), that an order so framed is ultra vires, because it provides for something beyond the mere fixing of the amount of the fees and poundage. There is something to be said for that argument, but I think it would be reading the language of the section too strictly, in view of the subject matter, to say that it was not competent for the Lord Chancellor to fix the amount of the fees and poundage by leaving it, to a certain extent, in the discretion of a designated official to say what the amount shall be in a particular case, provided it does not exceed a certain maximum. My first conclusion therefore is that the order in itself is not ultra vires.

The next step is this: In a case decided as this was in a District Registry the designated officer to fix the amount, but nothing more, is the District Registrar; in a case which is proceeding in London the designated officer is a Master of the Supreme Court, and he is the persona designata, as it were, to take the place of the Lord Chancellor by his authority and direction to fix the amount in a particular case. He is the statutory authority. From such an authority so constituted there cannot, in my opinion, be an appeal unless the appeal is conferred by statute, or by some rule or order for this purpose having the effect of statute.

It is said that there are two orders, either of which authorizes an appeal from the District Registry. One of these is Order LXV., r. 27 (39), which provides that: "Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him," and so forth. That rule was referred to in *Townend's Case.* (1) In my opinion it has no application to this case at all, because

(1) 24 Q. B. D. 621.

I do not think that the sheriff's bill of fees and charges which was carried in in this case, because of disputes between the parties, is within the meaning of the rule a bill of costs, and I do not think that the action of the District Registrar in refusing to allow poundage on the full amount of the judgment debt was a disallowance by the taxing officer, within the meaning of that rule. But then, it is said, and this is much more insisted upon, that it comes under Order XXXV., r. 9. Order XXXV. is an order dealing with the proceedings in District Registries, and there are three rules, all of which I think it is necessary to consider together. The first rule is number 1 which, as has been pointed out, covers all steps in the matter down to and including the final judgment. It is necessary to find some rule which extends the jurisdiction of the Registrar beyond the final judgment. Rule 4 was referred to as supplying that extension. That rule continues the jurisdiction of the District Registrar beyond final judgment, and covers execution and the taxing of the costs. Then comes r. 9, which is in general terms, and provides that any person affected by any order, finding or decision, of a District Registrar may appeal to a judge. Taking that opening sentence by itself for the present, I should have thought that language was applicable to orders, findings, or decisions, of a District Registrar which are contemplated or provided by the language of the various rules of this order. I think that view is strengthened by the second sentence of the rule, which provides that such rules shall be made, notwithstanding that the order or decision was in respect of a proceeding or matter as to which the Registrar had jurisdiction only by consent, because I think that indicates that the framers of the rule considered that, where an order was made under some jurisdiction other than that conferred directly by the order, it was necessary to provide for the special case. Therefore there is a special provision referring to the jurisdiction of the Registrar which is given him by consent of the parties. Upon the construction therefore of the rules and orders which are relied on I fail to find the necessary statutory authority.

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Bankes L.J.

Now I come to consider the decisions. This Court always hesitates to interfere with a decision which has governed the practice for a long series of years, unless the case seems absolutely plain. In my opinion the rule is sufficiently plain the other way; but if it were not so, I should hesitate to interfere, because the decision of *Townend* v. *Sheriff of Yorkshire* (1) has regulated the practice for so long. It was a case directly in point, although Order xxxv. was not quoted or referred to. I need not go into the details of that decision. The Divisional Court, consisting of Lord Coleridge and A. L. Smith J., decided in a case precisely like the present that there was no right of appeal. But then it is said that there are two cases which have been decided subsequently to that case which have thrown some doubt upon the decision, or at any rate drawn a distinction between a case where a Registrar has decided wrongly on a question of amount and decided wrongly on a question of principle. In my opinion neither of those two cases had the slightest bearing upon the point. One of them is *Madeley* v. *Greenwood.* (2) In that case it is plain that the right of appeal was never under discussion at all. The only point before the Divisional Court was whether the Registrar had, or had not, performed a material part of his duty. It was said that he had omitted to take into consideration a portion of the material which it was his duty as the Registrar under the order to consider. The application was for an order commanding the District Registrar to tax certain costs. I do not think anything that was said or done in that case throws any light upon the point we have to consider. The other case was *In re Beeston* (3); but when it is looked at it is plain that the proceeding there was under the Bankruptcy Rules in which an appeal was expressly given. Although in the course of the argument the late Mr. Herbert Reed referred to the case of *Townend* v. *Sheriff of Yorkshire* (1), and although Wright J. during the course of the argument seems to have brushed that decision aside by saying it was a question of amount only, and in his

(1) 24 Q. B. D. 621. (2) 42 Sol. J. 34.
(3) 68 L. J. (Q. B.) 344.

judgment said something to the same effect, that was an obiter dictum, for the case itself has no bearing upon the particular matter we have to decide.

The result I agree is unsatisfactory in this sense, that although the District Registrar is given a certain jurisdiction under the order and an authority which is called an authority to tax fees and charges, he cannot bind the parties by his decision, as it seems to me, to any material extent, because I cannot see that his decision can deprive either party of a right which they had, apart altogether from the Sheriffs Act, 1887, and apart from the jurisdiction which is given to the District Registrar, of contesting by way of action what the proper fees and charges of the sheriff are. The sheriff cannot of course claim more than the Sheriffs Act allows, but whether he is entitled to what he claims, or less than the whole of what he claims, seems to me to be entirely open in an action, apart altogether from any decision of the District Registrar. I think that is unsatisfactory, and it may be that it should be put right by legislation. I think it is regrettable that it should be possible to appeal in such a matter as this where the matter arises in bankruptcy, and yet not possible where the matter arises as it does here. It seems absurd that an appeal would probably be permissible if a summons had been taken out here, and it had been possible to proceed in the Registry as a step in the action, but I think we must discuss this matter strictly, having regard to the language of the rules, and to the decision in *Townend's Case* (1), which was decided so long ago. For these reasons I think that the appeal fails, and that it must be dismissed with costs.

SCRUTTON L.J. It cannot be said that the law relating to sheriffs' charges is in a satisfactory condition, and I trust that the body having power to make rules for imposing and assessing these charges may endeavour to simplify these matters and place them upon a more reasonable basis. The matter begins with the power given in the Sheriffs Act, 1887, to the Lord Chancellor, with the advice and consent of the

(1) 24 Q. B. D. 621.

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judges of the Court of Appeal and the High Court of Justice, or any three of them, with the concurrence of the Treasury, to fix the fees and poundage that a sheriff may take. I cannot help thinking that when that section of the statute was passed the difference was not appreciated between making a fixed scale of charges which should be applicable to constant facts and an adaptable scale which should be applicable to variable facts. The two things, as Bankes L.J. has pointed out, are quite different. What the Lord Chancellor, with the advice of the judges who are to advise him under the section, did was to draw up a scale of charges some of which fix charges at so much per mile or so much per pound, and some of which leave the amount to be fixed according to the work done, not exceeding so much. Then a clause was added: "The amount of any fees and charges payable under this table shall be taxed by a Master of the Supreme Court or a District Registrar of the High Court, as the case may be, in case the sheriff and the party liable to pay such fees and charges differ as to the amount thereof." By that clause the amount of charges applicable to the particular case is referred to the Master or the District Registrar, and I have felt much pressed by the argument that this delegation is not a matter contemplated by the original section. However, for the purposes of this case I assume that the Sheriffs Order was within the powers given by the Act although, as I have said, I have considerable doubt about it.

Then comes the question, when the Master or the District Registrar has fixed the amount of the fees and so fixed the charges, is there or is there not an appeal from his decision? There is no appeal given in the order itself, and according to general principles unless an appeal is given by statute there is no appeal. Three years after the Act was passed this question came before the Divisional Court in *Townend* v. *Sheriff of Yorkshire*. (1) It was there argued that as a taxing power was given it came within Order LXV. of the rules which provided an appeal from taxation. The Court took the view that although the word "taxed" was used, it was not

(1) 24 Q. B. D. 621.

used in its technical or artificial sense, but was used in the sense of settling or estimating as if the matter were referred by way of arbitration to a chosen arbitrator, and that from that decision by a named person there was no appeal. The Court took the view that it did not very much matter whether there was an appeal, because the decision so given did not bind anybody and it was quite open to anybody who objected to the decision to question it, either by defending or bringing an action. I am afraid I do not quite understand some of the language used by the Court in this case. For instance, A. L. Smith J., to whose decision his old pupil is not likely to show any disrespect, says this: "The Order imposes on the Master or District Registrar the duty of fixing the amount due from one person to the other. The calculation of amount creates no liability per se." How you can possibly fix the amount due from one person to another and yet create no liability between them, I am afraid I do not understand, and it seems to be quite clear that the view taken by Lord Coleridge and A. L. Smith J. of the effect of the order when made makes a fixing perfectly useless, because it can be disputed by either party in a subsequent action. At the same time I have felt that this Court is very slow to interfere with a course of practice of some thirty or forty years' standing, and if in the case of *Townend* v. *Sheriff of Yorkshire* (1) Order xxxv. had been referred to and considered, and the argument under it negatived, I think I should have been extremely slow to say anything personally to interfere with that decision, but it is the fact that Order xxxv. was not cited to the Court at all.

Now Order xxxv. deals with Orders of District Registrars, and r. 9 in the widest terms says this: "Any person affected by any order, finding or decision of a District Registrar may appeal to a Judge." It is quite true in this case that no order has been drawn up, and technically, I suppose, there is not a "finding" in the ordinary sense of a finding of fact, but how the Registrar can fix charges without coming to a "decision" I do not understand, and it appears to me that

(1) 24 Q. B. D. 621.

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Scrutton L.J.

those very wide words cover the decision of a District Registrar fixing charges. I agree that the wording of the whole of the Order shows that it is speaking of proceedings in a cause or matter proceeding in a District Registry. Here there was a cause or matter proceeding in a District Registry, the matter in which the judgment for 40,000*l.* had been obtained on which the sheriff was executing the writ of fieri facias. When the sheriff started the proceedings to get the amount of his charges fixed, he did it by delivering a bill headed in the proceeding "Union Bank of Manchester, Limited, and Alfred Ernest Grundy" and called a "Bill of Costs." When the District Registrar gave his decision and his reasons he headed them both in the proceeding "Union Bank of Manchester and Grundy," and it seems to me within those words that there was a proceeding pending in the District Registry, and that in that proceeding the District Registrar gave a decision. I cannot myself see any reason for taking this decision out of the operation of r. 9. The suggested reason is that the sheriff is not a party to the action of *Union Bank of Manchester* v. *Grundy*, but the question what the sheriff can charge is a question in the action. The execution creditor can only charge against the execution debtor the amount that he has properly paid to the sheriff, and it appears to me that it must be open to the execution creditor and the execution debtor to dispute in the action what is the amount properly paid to the sheriff. If the proceedings had been carried out with greater regularity and a summons had been taken out to fix the charges, I cannot have any doubt that it would have been headed in the action. It would have been served on the parties to the action, and the decision of the District Registrar would have been given in the action. For that reason it seems to me that in this case the decision of the District Registrar comes within the words of Order xxxv., r. 9, and that the statutory appeal which is not given in the Sheriffs Order itself is given by virtue of Order xxxv., r. 9. It is agreed that if the execution debtor were bankrupt there would be an appeal from the decision of the District Registrar fixing

the sheriff's charges by reason of the Bankruptcy Rules, which expressly provide for such an appeal. If there is an appeal in that case it seems to me impossible to suggest any reason why there should not be an appeal when the execution debtor happens to be solvent instead of a bankrupt.

For these reasons I have come to the conclusion, although as I say, with considerable doubt, because I think the matter is very obscure, that an appeal does lie in this case, and that therefore the decision of Acton J., refusing to hear the case was wrong, but as my brothers think differently, the parties will be left to the remedy of an action to find which is right on the real question in issue between them.

EVE J. I agree with the conclusion arrived at by Bankes L.J. In my opinion in construing the order of July 8, 1920, we ought to adhere to the construction imposed on the similar order of August 31, 1888, by the Divisional Court in *Townend* v. *Sheriff of Yorkshire* (1)—namely, that the jurisdiction of the taxing officer under the order is limited to determining the question of amount, and that if the officer is tempted to travel beyond his jurisdiction and decide a question not merely of amount but of principle, neither party to the dispute is precluded from challenging this excess of jurisdiction. This is I think clear from the judgment of Lord Coleridge C.J. He says (2): "The matter in dispute before the Registrar was amount. It is true that in almost every question of amount the right to charge anything at all might be involved. But where a person has a jurisdiction limited to the determination of amount it is reasonable to conclude that it was intended to limit the words used in the Order to a matter within his jurisdiction. The execution creditor is not without remedy, for the parties cannot give the Registrar jurisdiction, and if he has allowed, not a wrong amount, but an amount which he had no right to allow, viz., for seizures which were not seizures, that can be questioned in an action with all its ordinary consequences of appeal, costs, &c. No provision for review is made by

(1) 24 Q. B. D. 621. (2) 24 Q. B. D. 624.

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Eve J.

the order, and therefore the appeal must be dismissed." To the same effect is a passage from the judgment of A. L. Smith J., where he says (1): "The calculation of amount creates no liability per se, it is no order to pay, and the person against whom the assessment is made may resist payment and contest his liability." That view disposes of so much of the argument as is founded upon Order LXV.

Then it is said that the right of appeal is to be found in Order XXXV. On this point the Court is placed in a difficulty, because we have before us no summons or other process by which the sheriff brought this matter before the Registrar. I do not accept the view that it would have been competent for the sheriff to issue a summons in the action under Order XXXV., r. 7, and so bring the matter within the rules of that order. Probably the correct way to obtain a taxation and award under the Sheriffs Order of 1920 is by an originating summons intituled In the Matter of the Sheriffs Act, 1887, and of the Order of July 8, 1920, made thereunder, that is to say, an originating summons under the Sheriffs Act and not under Order XXXV. at all. I cannot therefore agree that this matter could have been satisfactorily dealt with by a summons in the action.

It has been pointed out that the position is different when the execution debtor has become a bankrupt, but it must be remembered that in that event the rights of third parties have supervened. The rule in bankruptcy is designed to give those other parties an opportunity of challenging any agreement come to concerning the amount to be allowed to the sheriff which they may regard as unsatisfactory. I agree it seems inconvenient that, after the Registrar has taken the trouble of assessing the amount of poundage, it should be open to both parties to question the amount if he has exceeded his jurisdiction; but this can be avoided by the Registrar declining to proceed with the reference until the question of principle has been determined.

As matters stand I agree with Bankes L.J. that this appeal should be dismissed.

Appeal dismissed.

(1) 24 Q. B. D. 625.

Solicitors for appellant: *Seaton Taylor & Co., for H. B. Greenwood, Kendal.*

Solicitors for respondents: *A. D. Dean & Co., Liverpool, for Arthur Smith, Wigan.*

NOTE.

Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, sub-s. 2: "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff . . . . may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and High Court of Justice, or any three of them, and with the concurrence of the Treasury."

Order dated July 8, 1920, under s. 20, sub-s. 2, of the Sheriffs Act, 1887, fixes the fees set forth in the Schedule as the fees to be demanded, taken, and received by any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff in the several proceedings mentioned in the Schedule.

The Schedule is headed "Table of Fees—Execution of Writs of Fieri Facias." It contains the following sections:—

2. "For seizure by the sheriff's officer for each building or place separately rated at which a seizure is made, when the sum indorsed on the writ of execution does not exceed 100*l.*, 1*l.* 1*s.*, and when it exceeds 100*l.*, 1*l.* 11*s.* 6*d.*"

3. "For work done by the sheriff's officer in making inquiries as to claims for rent or to the goods, including copying claims and giving the necessary notices to all parties, a sum not exceeding 1*l.* 1*s.* And for all out of pocket expenses actually and reasonably incurred in relation to such work, including postage, telegraphic and telephonic messages a further sum not exceeding 1*l.* 1*s.*"

Sect. 4 provides for 8*s.* 6*d.* a day for each man in possession. Sect. 5 provides, for the removal of goods or animals to a place of safe keeping, when necessary, "the sum actually and reasonably paid." Sects. 6 and 7 provide in the same terms for the keeping of goods and animals after removal. Sect. 8 is "For sale or preparation for sale by auction . . . . (2.) When no sale takes place either by auction or by private contract (*a*) For work actually done in preparing inventory and valuation, compiling catalogue and preparing for sale, a sum not exceeding 4 per cent. on the value of the goods if such value does not exceed 200*l.* If the value is in excess of that amount a sum not exceeding 4 per cent. on the first 200*l.*, and a further sum not exceeding 3 per cent. on the excess (*b*) For advertising . . . . the intended sale, printing catalogues and bills, and distributing and posting the same, the sum actually and reasonably paid. (*c*) For labour . . . . employed in lotting and showing the goods, the sum actually and reasonably paid."

Sect. 10 is as follows: "Sheriff's poundage and the fee for delivery of the writ to the under-sheriff shall be the same as before until further order." . . . .

"In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be.

"The amount of any fees and charges payable under this table shall be taxed by a Master of the Supreme Court or a District Registrar of the High

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Court, as the case may be, in case the sheriff and the party liable to pay such fees and charges differ as to the amount thereof." . . . .

Rules of the Supreme Court, Order XXXV., r. 1: "Where a cause or matter is proceeding in a district registry, all proceedings, except where by these rules it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the district registry down to and including the entry of final judgment, and every final judgment and every order for an account, by reason of the default of the defendant, or by consent, shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in the Central Office."

Rule 4: "Where a cause or matter is proceeding in a district registry, all writs of execution for enforcing any judgment or order . . . . shall issue from the district registry, and all costs shall be taxed in the district registry, unless the Court or a judge shall otherwise direct."

Rule 9: "Any person affected by any order, finding, or decision of a district registrar may appeal to a judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent." . . . .

Order LIV., r. 21: "Any person affected by any order or decision of a master may (except in the cases provided for in rule 22A) appeal therefrom to a judge at chambers." . . . .

Order LXV., r. 27 (39): "Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the taxing master, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objection, and may thereupon apply to the taxing officer to review the taxation in respect of the same. . . . .

(40) Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstances relating hereto.

(41) Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur . . . . apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

W. H. G.

[IN THE COURT OF APPEAL.]

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MINISTER OF AGRICULTURE AND FISHERIES *v.* DEAN.

Landlord and Tenant—Agricultural Holding—Lease—Notice to quit—Compensation for Disturbance—Claim by Lessee—Holding occupied by Sub-tenants—Proof of Loss or Expense—Agriculture Act, 1920 (10 & 11 *Geo.* 5, *c.* 76), *s.* 10, *sub-s.* 6.

The effect of s. 10, sub-s. 6, of the Agriculture Act, 1920, is that as a condition precedent to his right to compensation for disturbance a tenant must prove that he has incurred some loss or some expense of the kind indicated in the sub-section; that on proof of that he is entitled as a minimum to one year's rent of the holding; but that unless he proves some loss or some expense of the kind indicated he does not bring himself within sub-s. 6 and is not entitled to compensation.

Therefore where a lease of a holding under the Act was duly determined by notice to quit and the holding was entirely in the occupation of sub-tenants whose sub-tenancies terminated without notice on the termination of the lease, and the lessee did not sell or remove any household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding:—

Held, that he was not entitled to compensation for disturbance under s. 10.

APPEAL from the decision of the judge of the County Court of Hampshire holden at Bournemouth upon a case stated by an arbitrator under s. 13 of the Agricultural Holdings Act, 1908, and s. 18 of the Agriculture Act, 1920.

The case was as follows:—

1. By an indenture dated August 20, 1918, and made between J. E. Cooper Dean of the one part and the Board of Agriculture and Fisheries of the other part certain lands and premises at Iford Farm, Holdenhurst, in the county of Southampton, were demised by J. E. Cooper Dean to the Board for a term of twenty-one years from September 29, 1918, at a yearly rent of 67*l.* subject to the following provision:—

"If the landlord in his own absolute discretion shall be of opinion that the land hereby demised or any part thereof is required for building mining or other industrial purpose or for roads necessary therefor he shall be at liberty to determine the term hereby granted by giving the Board

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twelve calendar months previous notice in writing of his intention so to do such notice to expire on one of the usual quarter days and in the event of a part only of the land being required by the landlord the rent payable by the Board shall as from the date of resumption by the landlord be reduced by such sum as in default of agreement may be determined by arbitration in manner hereinafter provided."

The lands and premises constitute a holding within the meaning of s. 10 of the Agriculture Act, 1920. (1)

2. The said J. E. Cooper Dean died on August 16, 1921, having by his will dated March 31, 1914, appointed James Edward Cooper and Henry Walter King Rawlins to be the executors thereof and thereby devised his properties in the parishes of Pokesdown, Christchurch, and Holdenhurst, generally known as the Iford Estate (which included the land and premises demised by the said indenture) to his daughters Alice Elizabeth Cooper Dean and Ellen Ann Cooper Dean

(1) Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), s. 10, sub-s. 1: "Where the tenancy of a holding terminates after the commencement of this Act by reason of a notice to quit given after May 20, 1920, by the landlord, and in consequence of such notice the tenant quits the holding, then" —unless the tenant has been guilty of certain defaults and the notice to quit states that it is given for one or more of them—"compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section."

Sub-s. 6: "The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation), but for the avoidance of disputes such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount of two years' rent of the holding."

Sub-s. 7: "Compensation shall not be payable under this section—

(a) in respect of the sale of any goods, implements, fixtures, produce or stock unless the tenant has before the sale given the landlord a reasonable opportunity of making a valuation thereof."

as tenants in common. The will was duly proved on December 14, 1921. Shortly after the date of the notice to quit referred to in para. 5 hereof the executors assented to the devise to A. E. Cooper Dean and E. A. Cooper Dean, who thereby became and were at all material times the landlords for the purposes of the Agricultural Holdings Acts of the lands and premises demised to the Board.

3. Under the Ministry of Agriculture and Fisheries Act, 1919, the benefit of the indenture of lease was transferred to the Minister of Agriculture and Fisheries.

4. The lands and premises demised by the indenture were let by the Board or Minister on annual tenancies to various tenants for cultivation as small holdings, and were wholly in the occupation of the sub-tenants at the date of the termination of the Minister's tenancy hereinafter referred to.

5. Notice dated December 8, 1921, signed by the solicitors of the executors was served on the Minister under the provision in that behalf set out above requiring him to quit and deliver up possession of the lands and premises demised by the indenture on December 25, 1922, and in accordance with this requirement the Minister and his sub-tenants quitted and delivered up possession of the said lands and premises. After the determination of the Minister's tenancy certain of the sub-tenants continued in occupation of parts of the lands and premises under agreements for tenancies made between them and the executors.

6. On November 14, 1922, a letter in the following terms was sent on behalf of the Minister to the solicitors of the executors: "Iford Farm, Holdenhurst. In reply to your letter of the 9th ultimo enquiring whether the Ministry would care to continue the tenancy of part of the land held of your clients, I am to say that the Ministry thinks that it would be better that your clients should let the land direct to the tenants as it is understood they are prepared to do. By the terms of the existing tenancies they automatically terminate upon the expiration of the Ministry's tenancy without service of any notice to quit by the Ministry, and the tenants cannot therefore claim from the Ministry any

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compensation for disturbance under the Agriculture Act, 1920. The Ministry claim to be entitled to recover such compensation from your clients, and it is proposed to utilize any amount so recovered for compensating those tenants who have to leave their holdings.

"To preserve the Ministry's rights in this respect I enclose a formal notice of claim of which you will I presume accept service on behalf of the landlords."

The following notice was enclosed: "On behalf of the Minister of Agriculture and Fisheries I hereby give you notice of his intention to make a claim for compensation under s. 10 of the Agriculture Act, 1920, on the termination of the tenancy of land at Iford Farm, Holdenhurst, created by lease dated August 28, 1918, and made between J. E. Cooper Dean Esqre. of the one part and the Board of Agriculture and Fisheries of the other part. Signed H. D. Vigor. November 14, 1922. To the Executors of J. E. Cooper Dean or other the landlord of the said land."

7. On January 31, 1923, a letter from which the following is an extract was sent on behalf of the Minister to the solicitors of the executors: "Iford Farm, Holdenhurst. In due course it will be necessary to obtain a legal decision as to whether the Ministry is entitled under s. 10 of the Agriculture Act, 1920, to recover as compensation an amount equal to one year's rent of the holding without proof of any loss or expense directly attributable to the quitting of the holding.

"To comply with s. 18 of the Act I have to inform you on behalf of your clients that the particulars of the Minister's claim are as follows. . . . . Amount claimed 67*l.*, being an amount equal to one year's rent of the holding."

8. The Minister was not at the determination of his tenancy in occupation of the lands and premises except so far as occupation by his sub-tenants is in law occupation by him.

9. The Minister did not sell or remove any household goods, implements of husbandry, fixtures, farm produce, or farm stock on or used in connection with the said lands and premises. He contends that by virtue of s. 10, sub-s. 6, of the Agriculture Act, 1920, the compensation payable under

that section is to be "computed at an amount equal to one year's rent of the holding," i.e. 67*l.*, and that that sum is payable by the landlords to him.

10. It is admitted by the landlords that the Minister is not debarred from claiming compensation under the said section by reason of any matter referred to in paras. (*a*) to (*f*) of sub-s. 1 or by sub-s. 7 of s. 10.

11. The landlords contend that inasmuch as it is neither proved nor admitted that the Minister has incurred any loss or expense directly attributable to the quitting of the land and premises no compensation is due or payable.

12. The question for the determination of the Court is whether upon the facts stated the sum of 67*l.* is payable by the landlords to the Minister.

The county court judge held that no compensation was payable by the landlords to the Minister of Agriculture and Fisheries, the tenant, as there was no evidence that he had incurred any loss or expense directly attributable to the quitting of the holding.

The tenant appealed.

Sir Douglas Hogg A.-G. and *Hubert Hull* for the appellant.

The argument for the appellant sufficiently appears from the judgment of the Court. Sect. 10, sub-ss. 7 and 8, and s. 12 of the Agriculture Act, 1920, and *Hamilton Gell* v. *White* (1) were referred to.

J. H. Harris for the respondents was not called on.

BANKES L.J. The question raised by this special case is whether the tenant was in the circumstances stated entitled to one year's rent by way of compensation. He claims under s. 10 of the Agriculture Act, 1920, which gives compensation to tenants for disturbance. Sub-s. 1 provides that where the tenancy of a holding terminates by reason of a notice to quit given by the landlord in consequence of which the tenant quits the holding, then, except in certain events which it is not necessary to specify, compensation for the

(1) [1922] 2 K. B. 422, 429.

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disturbance shall be payable by the landlord to the tenant in accordance with the provisions of the section. Sect. 10 is divided into a number of sub-sections, to one of which, sub-s. 7, I should like first of all to refer, because it provides that "compensation shall not be payable under this section (*a*) in respect of the sale of any goods, implements, fixtures, produce or stock unless the tenant has before the sale given the landlord a reasonable opportunity of making a valuation thereof"; and in my opinion that sub-section indicates that the statute is dealing with compensation for actual loss, for otherwise it would in many cases be not only useless but unreasonable.

The question in the case turns however on sub-s. 6. Two alternative constructions are before the Court; one that where the tenant is entitled to compensation under the Act and is not claiming more than one year's rent he is entitled to that rent irrespective of the question whether he has suffered any loss or expense whatever attributable to the quitting of the holding; the other construction is that as soon as the tenant establishes that he has suffered some loss or expense directly attributable to the quitting of the holding, he is entitled to his year's rent, and is absolved from the obligation of proving the actual amount of the loss and expense. In my opinion the latter is much the more reasonable construction. Where a tenant proves that he has suffered loss or expense attributable to his removal as indicated in sub-s. 6, it is reasonable enough that he should be relieved of the trouble and difficulty of proving the actual amount; but that on proof of loss and expense he should be entitled to one year's rent as a minimum, and if he does not claim more than that it should not be necessary for him to prove the actual amount of loss or expense. That is a much more reasonable view to take of the intention of the Legislature than to suppose that a tenant is to have a year's rent by way of compensation even where it is manifest that he has incurred no loss or expense whatever. In my opinion the language of sub-s. 6 shows with reasonable clearness the intention of the Legislature to be that the tenant

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is under an obligation, as a condition precedent to his right to compensation, to prove that he has incurred some loss or some expense of the kind indicated in the sub-section, and that on proof of that he shall be entitled as a minimum to one year's rent; but that unless he proves some loss or some expense of the kind indicated he does not bring himself within sub-s. 6, and cannot claim that he is in a position to demand compensation in accordance with the provisions of s. 10.

The answer to the question in the special case must be that the sum of 67*l.* is not payable by the landlords to the Minister. The appeal must be dismissed.

SCRUTTON and ATKIN L.JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *The Official Solicitor.*
Solicitors for respondents: *Rawlins, Rawlins & Davy.*

W. H. G.

LAMB *v.* WRIGHT AND COMPANY.

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Jan. 24.

Bankruptcy—Property divisible among Creditors—Goods in Order and Disposition of Bankrupt—By "consent or permission of the true owner"—Possession of Bankrupt "in his trade or business"—Motor Car subject to hire-purchase Agreement—Car sold for use as pleasure Car—Occasional user in Business without Knowledge of Seller—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

The Bankruptcy Act, 1914, s. 38, provides: "The property of the bankrupt divisible amongst his creditors . . . . shall comprise the following particulars . . . . (*c*) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent or permission of the true owner, under such circumstances that he is the reputed owner thereof":—

Held, that in order that goods may come within this clause the consent or permission of the true owner must be given not only to their being in the possession, order or disposition of the bankrupt, but also to their being used in his trade or business.

In re Florence (1879) 10 Ch. D. 591, 594; and *In re Watson & Co.* [1904] 2 K. B. 753, 757 observations applied.

Held, further, that in order that goods may be in the possession, order

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or disposition of the bankrupt in his trade or business within the meaning of the clause they must be not merely visibly employed in his trade or business, but acquired and used for the purposes of the business.

Colonial Bank v. *Whinney* (1885) 30 Ch. D. 261, 274, 281 (reversed on other points (1886) 11 App. Cas. 426) observations applied.

Sharman v. *Mason* [1899] 2 Q. B. 679 held distinguishable.

ACTION tried at the Leeds Assizes by McCardie J. without a jury.

The plaintiff, Arthur Victor Lamb, was the owner of a Jowett touring two-seater motor car with a dickey seat behind and an engine of seven-horse power.

By an agreement dated May 3, 1923, and made between the plaintiff, therein called "the owner," and one Leonard Pinchin, therein called "the hirer," who carried on business as a grocer and fruiterer and resided at 28 Amberley Street, and also carried on business at 60 and 62 Prospect Street, Bradford, it was provided (inter alia): (1.) that the owner should let and the hirer should hire from him the said motor car for the term of six months from the date thereof subject to the conditions thereinafter contained, the car being of the agreed value of 268*l.* 10*s.* 8*d.*; (2.) that the hirer should pay to the owner for the hire of the car the said sum, whereof 97*l.* 10*s.* 8*d.* should be paid on the signing thereof and the balance of 171*l.* by equal monthly instalments of 28*l.* 10*s.* each; (4.) that the hirer should (i.) punctually pay the said instalments, (ii.) maintain and keep the car in good and serviceable order and condition to the satisfaction of the owner, and that no alteration or addition to it should be made without the previous consent in writing of the owner, (vii.) insure the car in the joint names of the owner and hirer against loss or damage by fire and certain other perils; (5.) that if the hirer during the currency of the agreement (i.) should make default in punctually paying any instalment, or (iii.) should have a receiving order in bankruptcy made against him or should enter into a composition or arrangement with his creditors or should execute an assignment for the benefit of his creditors, or should execute a bill of sale of his effects, or should suffer any judgment or order for the payment of money against him to remain unsatisfied, or

(iv.) should fail to observe or perform any of his stipulations in the agreement, or (v.) should do or suffer anything whereby the owner's rights of ownership might be prejudiced or jeopardized, then it should be lawful for the owner (without prejudice to any other remedy he might possess in respect of any breach of the provisions thereof or wrongful act on the part of the hirer), by himself or his agent or agents to take possession of the motor car and to remove the same, and that for the purpose he should be empowered to enter the premises where the same should be, and at his option to remain thereon for a period not exceeding twenty-one days, and to sell the car by public auction or private contract, and out of the proceeds of sale to make the payments therein mentioned; (8.) that the motor car during the currency of the agreement should be registered in the name of the owner, and that all costs charges and expenses in connection with the registration or arising out of any breach of the Motor Car Acts should be borne by the hirer; (9.) that the owner should be at liberty to place his name plate or any words or numbers to identify the motor car as his property upon any part thereof and the hirer should not during the currency of the agreement remove deface or in any way interfere with the said name plate words or numbers; (10.) that the hirer might at any time terminate the hiring by returning the car to the owner at his own expense; and (13.) that if all the monthly payments and other sums, if any, which might become due thereunder should be duly and punctually paid by the hirer the motor car should become his property, but unless and until such payments were so made it should remain the sole property of the owner and the hirer should not be deemed to have bought or agreed to buy the same but should be the bailee thereof only.

The hirer duly paid the deposit of 97*l.* 10*s.* 8*d.* before the signing of the agreement. By a policy of insurance dated May 10, 1923, the motor car was insured as a private car in the joint names of hirer and owner against the risks referred to in the agreement.

After obtaining the car from the plaintiff Pinchin

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used it as a pleasure car and also to some extent in his business.

On July 30, 1923, Pinchin absconded, having paid only two of the instalments mentioned in the agreement and being in debt to many creditors, among whom were the defendants, Messrs. Wright & Co., of Bradford, wholesale grocers. On August 8, 1923, Wright & Co. sent to Pinchin's premises and took possession of the motor car in order to preserve it for the creditors. On August 10 the plaintiff verbally demanded the return of the car from the defendants, but they refused to return it. On the last-mentioned date Mr. W. B. Wright, of the defendants' firm, presented a bankruptcy petition against Pinchin in the Bradford County Court. On August 11 an interim receiving order was made appointing the Official Receiver of the Court to be interim receiver of Pinchin's property and to carry on his business until the hearing of the petition. On August 13 the plaintiff made a formal demand of the defendants for the return of the car, which was not complied with.

On August 17, 1923, the plaintiff brought the present action against the defendants claiming the return of the car or its value, and damages for its detention.

On August 24 the receiving order was made. In September Pinchin was adjudicated bankrupt, and Mr. W. Lund was appointed trustee in bankruptcy. The trustee ratified the action of the defendants in taking possession of the car and they defended the action by his authority.

The plaintiff in his statement of claim alleged that he was at all material times the owner of the motor car; that by the hire-purchase agreement it was provided that if Pinchin made default in any payment to be made by him thereunder or had a receiving order made against him the plaintiff might retake possession of the car; that if the whole of the payments were duly made it should become the property of Pinchin, but until these payments were made it should remain the sole property of the plaintiff; that on August 3 the said payments were in arrear, and that on August 10 the plaintiff went to the house of Pinchin to retake possession of the car,

but was unable to do so, as the defendants had wrongfully taken possession of it; and that on August 10 and 13 the plaintiff demanded the return of the car from the defendants, who wrongfully refused to return it.

The defendants in their defence stated (inter alia) that they denied that the plaintiff was at any material time the owner of the motor car or entitled to the possession thereof; that the agreement was not in fact a hire-purchase agreement, but an absolute sale by the plaintiff to Pinchin of the motor car; and that on August 10 and also at the date when the action was brought the car was and it still was the property of the trustee in bankruptcy of Pinchin, and that the trustee was at these times and still was entitled to the possession thereof.

At the trial of the action evidence was brought on both sides as to the nature of the motor car, the purposes for which the parties intended that it should be used by Pinchin, the purposes for which he had used it, and the extent to which he had used it in his business. The further facts and findings of fact are stated below in the judgment of the learned judge.

C. J. Frankland for the plaintiff.

Waugh K.C. and *Richard Watson* for the defendants.

The main question of law argued was whether or not the motor car came within s. 38 (*c*) of the Bankruptcy Act, 1914 (1), it being contended on behalf of the plaintiff that in the circumstances it did not, and on behalf of the defendants that it did, come within that clause.

(1) The Bankruptcy Act, 1914, provides:—

Sect. 38: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, ... shall comprise the following particulars:—

. . . . . .

"(*c*) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

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McCARDIE J. (1) This action was tried before me in December, 1923, at the Leeds Assizes. The points at issue were ably argued by counsel on both sides.

The plaintiff claimed the return of a motor car or its value. It was agreed by counsel that in substance the defendants were defending the action on behalf of the trustee in bankruptcy of one Leonard Pinchin. The questions of law turned on the true construction of s. 38 (*c*) of the Bankruptcy Act, 1914. The questions of fact will hereafter appear. [His Lordship read s. 38 (*c*) of the Bankruptcy Act, 1914 (2); stated the undisputed facts substantially as above set out; read the material clauses of the agreement, observing that it was in the *Helby* v. *Matthews* (3) form, and that under it the property in the motor car did not pass to Pinchin until the price had been fully paid; and continued as follows:] The trustee in bankruptcy of Pinchin, by whose authority the defendants defend this case, claims that he is entitled to the motor car under s. 38 of the Bankruptcy Act, 1914 (2), and unless that section applies the plaintiff must obtain judgment. Such are the undisputed facts. No question was raised as to trade custom with respect to the hire or hire purchase of motor cars. Upon the other facts and circumstances a considerable amount of testimony was given. I have weighed the evidence. I find the following to be the facts. The car in dispute was in its make and structure a pleasure car. It was a two-seater seven-horse power car with a dickey seat behind. It was sold as a pleasure car by the plaintiff and purchased as such by Pinchin, although the hire purchase agreement did not expressly so describe it. That agreement provided, as I have said, that no alteration should be made without the consent of the plaintiff. Pinchin had told the plaintiff that he was purchasing the car for use as a pleasure car. It was insured by Pinchin as a pleasure car. When the insurance agent saw Pinchin on several occasions using it as a business car he protested. The plaintiff himself, who had sold it as a

(1) The judgment was written. (2) See note (1) ante, p. 861.
(3) [1895] A. C. 471.

pleasure car, assumed that it was used as such. He was never aware that Pinchin used it for business purposes. As to the extent of the business user of the car, the facts I find to be these. Pinchin had another shop in addition to the one at 20 Amberley Road, Bradford. He had a number of customers in connection with both shops to whose houses he delivered the goods ordered by them. Pinchin got a portion of his supplies from the wholesale market and would himself carry by his own vehicles a part of those supplies to one or other of the shops. After he got possession of the car in dispute Pinchin used it from time to time (*a*) for the purpose of delivering goods to the houses of the customers, and (*b*) for the purpose of getting supplies from the wholesale market. The extent to which the car was used for those purposes was much in dispute before me. In my view the truth of the matter is that the car was used on two or three days in the week either for taking goods to customers or for visits to the wholesale market. The user on such days was for a small part of the day only and not for the whole day. The car was employed somewhat beyond a mere emergency car. But in my opinion its main function and principal use with Pinchin was that of a pleasure car. He used it regularly as such both on week ends and other days. No name or advertisement was ever placed on it, and it was never altered in any way so as to be convenient for employment as a commercial vehicle.

Such are the facts. Do they support the claim of the trustee under s. 38 ? This depends to a large degree on the proper construction of that section. It is plain that the car was at the commencement of the bankruptcy in the possession of the bankrupt. It is equally plain that that possession was with the consent and permission of the true owner. It is clear too that the car was used with considerable frequency in the trade or business of the bankrupt. Does the section require, ere a trustee can claim, that the consent and permission of the true owner of goods be given not only to the possession by the bankrupt but also to their user in his trade or business ? If this full measure of consent be

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required then the defendants here, on behalf of the trustee, fail in their defence, for it is plain that the plaintiff not only did not consent to the car being used in the bankrupt's trade or business, but that he was not aware that it was so used. The plaintiff's counsel, Mr. Frankland, submits that the section requires the full consent. In my opinion he is right. The section is limited in its operation to goods "in the trade or business of the bankrupt." It does not apply to domestic articles of furniture in a bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another he knows, or ought to know, that he runs a risk of losing those goods by the operation of s. 38. But if he only consents to the user of goods for private and non-business purposes then he is not exposed, in my opinion, to the confiscatory provisions of s. 38 merely because the bankrupt, without his knowledge or consent, has used those goods in and for his trade and business. A man, of course, cannot be said to consent to what he does not know.

I have stated my own view of the meaning of s. 38. There appears to be no direct decision on the point, but the cases seem to substantially support my opinion in principle and in reasoning. Thus in *In re Florence* (1), James L.J., when dealing with a point which, though not the same as the one before me, is somewhat similar, said, referring to s. 15 of the Bankruptcy Act, 1869: "It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit." Those words seem applicable in principle to the present case, where the plaintiff never knew that the bankrupt was employing the car in his trade or business, and therefore did not permit it. They are fully consistent also with the earlier cases of *Load* v. *Green* (2) and

(1) 10 Ch. D. 591, 594.

(2) (1846) 15 M. & W. 216.

Smith v. *Hudson.* (1) In *In re Watson & Co.* (2), Vaughan Williams L.J., in giving the judgment of the Court of Appeal, reviewed several decisions and summarized them by saying that "the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt." He added: "This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe not might or might not) arise: see *Hamilton* v. *Bell* (3); *Gibson* v. *Bray* (4); and *Ex parte Bright.* (5) The question for us then is, Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business?" In my opinion, these words of Vaughan Williams L.J. support the view I have expressed as to the meaning of s. 38.

I hold that the plaintiff in the case now before me did not consent or permit that Pinchin should have or employ the car in his trade or business, and it therefore follows that s. 38 does not apply to the facts before me and the trustee fails in his claim.

There is another aspect of the case which also excludes, in my opinion, the operation of s. 38. The words I refer to are "being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business." What is meant by the words "being .... in his trade or business"? Those words were considered by the Court of Appeal in *Colonial Bank* v. *Whinney.* (6) It is true that the decision of the Court of Appeal was reversed by the House of Lords (7), but the reversal did not impair,

(1) (1865) 6 B. & S. 431; 34 L. J. (Q. B.) 145.
(2) [1904] 2 K. B. 753, 757.
(3) (1854) 10 Ex. 545.
(4) (1817) 8 Taunt. 76.
(5) (1879) 10 Ch. D. 566.
(6) 30 Ch. D. 261.
(7) 11 App. Cas. 426.

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I think, the opinion of the Court of Appeal on the point I am now dealing with: see Williams on Bankruptcy, 12th ed., p. 255. In *Colonial Bank* v. *Whinney* (1) Cotton L.J. said: "I think the true construction is that the goods must be in his" (the bankrupt's) "order or disposition for the purposes of, or purposes connected with, his trade or business." (2) Lindley L.J. said: "The language 'in his trade or business' means . . . . not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes." (3) It would seem to follow from these dicta that if a motor car be acquired, as here, for private use and be primarily employed, as here, for private purposes, then it cannot, I think, be said to be a car "in the trade or business" of the bankrupt. The facts in *Sharman* v. *Mason* (4) were very different from those in this case, and *Sharman* v. *Mason* (4), moreover, must always be read subject to *In re Watson & Co.* (5) I may add that *Ex parte Lovering* (6) is not devoid of interest upon the matters here in question.

The plaintiff therefore succeeds. I assess the value of the car at 200*l.* and the damages for detention at 5*l.* I give judgment for the return of the car and for 5*l.* damages. The plaintiff is entitled to costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Fielder, Jones & Harrison, for C. A. Payne, Bradford.*

Solicitor for defendants: *F. B. Brook, for A. V. Hammond & Co., Bradford.*

(1) 30 Ch. D. 261.
(2) 30 Ch. D. 261, 274.
(3) 30 Ch. D. 261, 281
(4) [1899] 2 Q. B. 679.
(5) [1904] 2 K. B. 753.
(6) (1883) 24 Ch. D. 31.

J. R.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
1924
March 3.

THE KING *v.* DENNIS.

THE KING *v.* PARKER.

Criminal law—Trial—Defendants separately indicted—Joint Trial by Consent of Counsel—Venire de novo.

A criminal Court has no jurisdiction to try two separate indictments against two defendants at one and the same time, even with the consent of counsel for the prosecution and counsel for the defendants.

Rex v. *Crane* [1920] 3 K. B. 236; in H. L. sub nom. *Crane* v. *Director of Public Prosecutions* [1921] 2 A. C. 299 applied.

Reg. v. *Brett and Parish* (1848) 3 Cox, C. C. 79 not followed.

APPEAL from convictions at Tewkesbury Quarter Sessions.

The defendants were separately indicted under the Betting Act, 1853, Dennis for using, and Parker for having opened, kept or used, a house for the purpose of receiving money by a machine known as an electrical amuser as and for the consideration of a promise to give a valuable thing on a certain event or contingency relating to a game. By agreement between counsel for the prosecution and counsel for the defence the defendants were tried together, as if they had been jointly indicted, but it was stated by the Recorder in his report to the Court that he was under the impression throughout the trial that the defendants were jointly indicted.

The defendants, having been convicted and fined, appealed, the main grounds of appeal, as stated in their notice of appeal, being misdirection and non-direction.

Earengey for the appellants.

[AVORY J. What authority was there for the appellants, who were separately indicted, being tried together? Was not the whole trial a nullity?]

In *Reg.* v. *Brett and Parish* (1) Lord Denman C.J. decided that, by consent, a jury might be charged with the trial of two or more indictments at the same time, even though the

(1) 3 Cox, C. C. 79.

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indictments were for different offences, and against different persons, where the circumstances upon which the indictments were founded formed part of the same transaction.

[AVORY J. *Rex* v. *Crane* (1) and *Crane* v. *Director of Public Prosecutions* (2) appear to show that *Reg.* v. *Brett and Parish* (3) cannot now be considered good law.]

In *Crane's Case* (1) there was no consent to the trial being proceeded with as it was.

[AVORY J. Is there any authority for the proposition that a criminal Court can be given jurisdiction by consent ?]

It is possible to waive what would otherwise be an irregularity.

A. F. Clements for the prosecution. The Court is not bound to, and should not, take the objection that the trial was irregular, as the parties desire to obtain a decision upon the main point—namely, whether the Betting Act has any application to the circumstances of this case.

The judgment of the Court (AVORY, HORRIDGE and SANKEY JJ.) was delivered by

AVORY J. We cannot accede to the suggestion made by Mr. Clements, that because this is a test case we should overlook a manifest want of jurisdiction in the Court of trial. It is always the duty of this Court, even although objection is not put forward by counsel, or in the notice of appeal, to take note of a point which goes to the jurisdiction of the Court of trial. In *Rex* v. *Crane* (1) it was held that where two indictments were proceeded with at one and the same time against two persons, this being done upon the assumption by judge and counsel alike, that the defendants were jointly indicted, the trial was a nullity. To use the words of the Earl of Reading C.J. (4): "The proceedings were void ab initio; from the moment the prisoners were given in charge of the jury the trial was a nullity." That view was confirmed on appeal to the House of Lords: *Crane* v. *Director of Public*

(1) [1920] 3 K. B. 236.
(2) [1921] 2 A. C. 299.
(3) 3 Cox, C. C. 79.
(4) [1920] 3 K. B. 237.

Prosecutions (1), the matter being considered of sufficient importance for the Attorney-General to give his certificate. Lord Atkinson there said (2): "When an accused person has pleaded 'not guilty' to the offences charged against him in an indictment, and another accused person has pleaded 'not guilty' to the offence or offences charged against him in another separate and independent indictment it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together." That being so, does the fact that in this case counsel for the defendants and counsel for the prosecution consented to the two indictments being tried at one and the same time make any difference? We are told that counsel consented for convenience to the two indictments being tried together, although it would appear that they never communicated that consent to the Recorder, who has stated to us that he was throughout under the impression that the defendants were jointly indicted. It is said that that consent distinguishes the present case from *Rex* v. *Crane*. (3) In our opinion consent cannot give jurisdiction in a criminal Court, if indeed it can in any Court, where no jurisdiction exists. As was said during the argument in the House of Lords in *Crane* v. *Director of Public Prosecutions* (4): "An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent." This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal Court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction. In these circumstances, however regrettable it may be that another trial should be necessitated, we must follow the course taken in *Crane's Case* (5), and make an order awarding a venire de novo for a trial of those two defendants according to law.

Order for venire de novo.

(1) [1921] 2 A. C. 299.
(2) [1921] 2 A. C. 321.
(3) [1920] 3 K. B. 236.
(4) [1921] 2 A. C. 299; 15 Cr. App. R. 183, 190.
(5) [1920] 3 K. B. 236; [1921] 2 A. C. 299.

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Solicitor for appellant Dennis: *A. Lionel Lane, Gloucester.*

Solicitor for appellant Parker: *S. Baker, Tewkesbury.*

Solicitors for prosecution: *Wellington, Clifford & Matthews, Gloucester.*

J. S. H.

C. A. 1924

March 6, 7.

[IN THE COURT OF APPEAL.]

ALIANZA COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Corporation Profits Tax—British Company resident in England—Trade wholly carried on Abroad by Local Board of Directors—Liability of Company to Tax—Finance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *ss.* 52, 53.

Corporation profits tax is imposed by s. 52 of the Finance Act, 1920, upon (inter alia) "the profits of a British company carrying on any trade or business" without any limitation as to where the trade or business is carried on, and therefore the tax is leviable upon the whole of the profits of a British company which carries on a trade or business wholly outside the United Kingdom, although the company is not liable to be assessed to income tax under Case 1 of Sch. D. upon the profits of the trade or business.

The operation of s. 52, which imposes the tax, is not in any way limited or affected by s. 53, sub-s. 2, which is a mere computation section.

Mitchell v. *Egyptian Hotels, Ld.* [1915] A. C. 1022 distinguished.

Saxone Shoe Co. (*France*), *Ld.* v. *Inland Revenue Commissioners,* 1923 S. C. 734 approved and followed.

Decision of Rowlatt J. [1923] 2 K. B. 760 affirmed.

APPEAL from the decision of Rowlatt J. (1) upon a case stated under the Finance Act, 1920, s. 56, sub-s. 6, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on March 9, 1922, the Alianza Co., Ld. (hereinafter called the "appellant company"), appealed against an assessment to corporation profits tax in the sum of 42,850*l.* for the accounting period of twelve months ending December 31, 1920, made upon the appellant company by the Commissioners of Inland

(1) [1923] 2 K. B. 760.

Revenue under the provisions of the Finance Act, 1920, Part V.

The appellant company was a limited company incorporated in England under the Companies Acts, 1862 to 1900, on June 17, 1903, with the following objects (inter alia) :—

"(*a*) To acquire and take over, as a going concern, the undertaking and business of the Alianza Co., Ld. (incorporated in 1895), and all or any the assets and liabilities of that company, and with a view thereto to enter into and carry into effect, with or without modification, an agreement already prepared and intended to bear even date with these presents and to be made between the Alianza Co., Ld. (incorporated in the year 1895), and Herbert Pemberton Leach, the liquidator of such company, of the one part and this company of the other part."

"(*b*) To carry on the business of manufacturers and exporters of and dealers in nitrates, iodine, and other products, carriers by land and water, shipowners, warehousemen, wharfingers, bargeowners, lightermen, forwarding agents, underwriters and insurers of ships, goods and other property, or any one or more of such businesses in all or any of their respective branches."

The appellant company took over and continued to carry on the business formerly carried on by the Alianza Co., Ld. (incorporated in 1895), which is described in the case of *Alianza Co.* v. *Bell* (1), wherein it was decided that a deduction claimed in respect of the exhaustion of the deposits from which nitrates and iodine were produced was not allowable for the purposes of income tax. The appellant company was controlled in England, and was assessed to income tax in respect of the whole of its profits under Case 1 of Sch. D, without any deduction in respect of the exhaustion of its deposits, until 1918, when its Articles of Association and methods of procedure were altered so as to remove the control from the United Kingdom and localize it in Chili. Among other changes, the following Articles were introduced by a

(1) [1906] A. C. 18; [1905] 1 K. B. 184.

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special resolution passed on September 19, 1918, and confirmed on October 10, 1918 :—

"83A. The Chilian business of the company (which expression in these Articles means and includes all the company's business and affairs whatsoever in the Republic of Chili or elsewhere in South America inclusive amongst other things of the business of carrying on and working the company's nitrate and other properties and everything connected therewith including the raising and borrowing of moneys and incurring of debts and liabilities winning getting buying selling and supplying nitrate and other goods the hiring employment and supply of labour the payment and discharge of debts and liabilities the keeping of accounts and the doing of all things in any way incidental to such business or the management thereof) shall be carried on and managed by a local board and that to the exclusion of the board of directors in the United Kingdom or any other board of directors of the company and such local board shall be wholly independent of any other board of directors of the company and of general meetings of the company (not being general meetings held in the Republic of Chili) and in no way under the control or influence or subject to any resolutions or directions thereof. Only general meetings of the company held in Chili shall (to the exclusion of general meetings held elsewhere) be competent to pass any resolutions binding on or affecting the local board or on any member thereof or having any binding force upon or in regard to the business or affairs of the company in Chili or elsewhere in South America. The local board shall meet only in Chili or elsewhere in South America."

"83B. The local board shall consist of not less than three and not more than seven persons to be from time to time appointed by resolution of a general meeting of the company held in Chili and every member of the local board shall ipso facto vacate office if and when he is requested by a resolution of a general meeting held as aforesaid to resign. . . . ."

"83D. The Chilian business shall be under the control of the local board (to the exclusion of any other board of

directors of the company) and the local board may in relation thereto exercise all such powers of the company as the local board in their opinion think requisite for the purpose of working developing and dealing with the Chilian business and the profits of the Chilian business shall be from time to time ascertained as and when the directors consider expedient and unless and until and except as otherwise directed by the directors the local board shall retain in Chili the profits of the Chilian business and shall remit to England such sums only as shall be necessary to enable dividends payable to persons in the United Kingdom to be paid or as may be specifically and specially required by the London board to be transmitted to London for expenses of the company incurred by that board in London. Dividends to persons outside the United Kingdom shall be satisfied out of profits retained in Chili and sufficient profits to pay any dividends from time to time declared which are payable to persons outside the United Kingdom shall be retained in Chili and that notwithstanding any direction from the directors. The powers of clauses 84, 85 and 86 of these Articles shall only be exercisable after consultation with and subject to the approval of the local board."

Since January 1, 1919, on and from which date the local board was constituted and empowered to act, the Chilian business, which included all the manufacturing and trading operations of the appellant company, had been carried on by and had been exclusively under the control of the local board in Chili. The appellant company was a member of an association, called the Nitrate Producers' Association, domiciled in Valparaiso. All the nitrate products of the appellant company and of the other members of the association were placed for disposal in the hands of this association, which negotiated for the sale throughout the world of the total fund of nitrate products and apportioned the contracts for sale among its members in proportion to the productive capacity of the nitrate grounds and machinery of the different members. The contracts were completed by the delivery of the quantity of nitrate specified and the collection of the

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purchase price thereof by the respective members of the association. All the purchasers either themselves resided or had agents resident in Chili, and all sales and payments were effected in that country. Iodine, which is a by-product of the nitrate beds, was disposed of under a similar arrangement through an association called the "Iodine Directorate," the only substantial difference being that as regards iodine the proceeds of sales were collected and distributed by the directorate. In the case of the appellant company the production and delivery of the nitrate and iodine and the receipt of the purchase price were in the hands of the local board in Chili. The whole of the profits were retained in Chili, excepting the amounts required for payment of dividends to the shareholders in the United Kingdom. The local board had the sole right to declare dividends, to call general meetings of the company, and to fix the date and place thereof. All general meetings of the company since January 1, 1919, had in fact been held in Valparaiso. The accounts had been audited and published by the local board in Valparaiso. A copy of the report and accounts for the year ended December 31, 1920, was attached to and formed part of the case. Those accounts covered all the operations of the appellant company in that year.

The appellant company had its registered office at Dashwood House in the City of London, where its secretary carried on his duties, registers of shareholders in the United Kingdom were kept, transfers of shares held by the shareholders in the United Kingdom were effected, and dividends to shareholders in the United Kingdom were paid.

It was admitted that since January 1, 1919, the head and seat and controlling power of the appellant company had been situate in Chili; that the facts were not distinguishable from those dealt with in *Mitchell* v. *Egyptian Hotels, Ld.* (1), and that in view of the decision in that case the profits and gains of the appellant company were not assessable to income tax under Case 1 of Sch. D.

It was contended on behalf of the appellant company:

(1) [1915] A. C. 1022; [1914] 3 K. B. 118.

(*a*) that according to the principles on which the profits and gains of the trade so carried on by the local board would be determined for the purposes of Sch. D the said trade was not carried on by the appellant company, and the appellant company was not carrying on any trade or business or any undertaking of a similar character; (*b*) that upon the principles on which the profits and gains of a trade would be determined for the purposes of Sch. D of the Income Tax Acts as interpreted in *Mitchell* v. *Egyptian Hotels, Ld.* (1), the profits arising from the trade carried on by the local board in Chili must be excluded; and (*c*) that the appellant company was not assessable to corporation profits tax, and if it were assessable it had no profits assessable to corporation profits tax, and the assessment ought to be discharged.

It was contended on behalf of the Crown (inter alia): (*a*) that the appellant company was a British company carrying on the trade or business of manufacturers and exporters of and dealers in nitrate and nitrate products; (*b*) that the whole of the appellant company's profits were accordingly assessable to corporation profits tax for the accounting period in question; (*c*) that the assessment had been rightly made and ought to be confirmed.

The Commissioners, who heard the appeal, were satisfied that the appellant company was a British company carrying on a trade or business through its local board in Chili, and they considered that though the profits of that trade or business were not assessable to income tax under Sch. D, because the trade or business was carried on wholly outside the United Kingdom, they were chargeable to corporation profits tax, and that for the purpose of assessment to that tax they must be determined on the same principles on which the profits of a trade carried on wholly or in part in the United Kingdom would be determined for the purpose of assessment to income tax under Case 1 of Sch. D. It was not disputed that upon this view the liability had been correctly computed as a matter of figures, and the Commissioners accordingly confirmed the assessment.

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On appeal Rowlatt J. held that under s. 52 of the Finance Act, 1920, the tax was leviable upon the whole of the profits of a British company which carried on a trade or business wholly outside the United Kingdom, although the company was not liable to be assessed to income tax under Case 1 of Sch. D of the Income Tax Act, 1918, upon the profits of the trade or business, and that the operation of s. 52, which imposed the tax, was in no way affected by s. 53, sub-s. 2, which was a mere computation section. He accordingly dismissed the appeal.

The appellant company appealed.

Edwardes Jones and *Hildersley* for the appellant company repeated the arguments used by them in the Court below.

Sir Patrick Hastings A.-G. and *R. P. Hills* for the Crown were not called upon.

POLLOCK M.R. This is an appeal from a judgment of Rowlatt J. confirming the decision of the Commissioners who decided that this particular company was liable to pay the corporation profits tax. No question arose as to the computation of the figures, because upon the view that there was a liability, it was admitted that the figures have been rightly compiled and the assessment rightly computed; the only question was whether or not the company was assessable at all.

Now I should really be content to leave the matter where Rowlatt J. has left it and to say that I agree with his decision and also with the decision in *Saxone Shoe Co. (France), Ld.* v. *Inland Revenue Commissioners* (1), to which our attention was called, in which Lord Clyde quite clearly interprets the Finance Act, 1920, and, I think, deals with the particular argument which has been presented to us in this case. But perhaps in a sentence or two I may add the reasons why I have come to the same conclusion as both those learned judges did.

The corporation profits tax is imposed by Part V. of the

(1) 1923 S.C. 734.

Finance Act, 1920, which by s. 52, sub-s. 1, provides that "there shall be charged, levied, and paid on all profits being profits to which this Part of this Act applies" a duty called the corporation profits tax, and by sub-s. 2 provides that: "The profits to which this Part of this Act applies are, subject as hereinafter provided, the following, that is to say:— (*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments."

Now those words are, in my judgment, clear, wide and far-reaching. If the profits are the profits of a British company carrying on a trade or business, they are made subject to this tax. It is admitted here that the company is a British company. It cannot be denied that it is carrying on business, and therefore it follows from the clear words of sub-s. 2 of s. 52 that those profits of that company are subject to this tax.

The argument presented to us is this: It arises under s. 53, and particularly under s. 53, sub-s. 2. It is said that s. 53 is placed in the Act for the purpose of determining how the profits, the subject of the tax, are to be computed; that if you read the whole of the section you will find that a number of rules are laid down which enable you to ascertain the true method of assessment; that, first of all, it is laid down by way of primary test that the profits and gains of a trade are to be determined as they would be determined for the purposes of Sch. D to the First Schedule to the Income Tax Act, 1918; that gives you a start; and that then as that Schedule may have been amended by subsequent enactment you come to a number of provisoes which change the method of assessment primarily laid down in accordance with the Income Tax Act; that in some of these profits are included, in others deductions are allowed which would not be allowed under the Income Tax Act, and some modifications are made; in particular under sub-s. 2 (*b*) the subject is to be allowed to make a deduction "in respect of interest on money borrowed for the purposes of the company," whereas under the ordinary rules of income tax law no such deduction could

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be allowed, and again, that the profits are to be estimated according to the actual profits in the accounting period and not on the principle of the three-years' average, and the like. It is, therefore, said that this section must be taken not merely as a computation section, but as in some way cutting down s. 52, which is the charging section. I cannot see how that argument can hold water. The charging section is clear, and I think the computation section is also clear. The argument is presented in order that there may be an application of the well-known case of *Mitchell* v. *Egyptian Hotels, Ld.* (1) It appears that in the present case the scheme which was adopted in that case was followed, and there was in Chili a local board which carried on the business of the company and remitted home, as in the *Egyptian Hotels Case* (1), the sums due for the dividends payable to the shareholders in the United Kingdom which were to be distributed by the London office.

Now it is important to remember that in the *Egyptian Hotels Case* (1) it was not determined that the Egyptian Hotels Company was wholly exempt from income tax. What was there determined was that the company was liable to be assessed in accordance with the rules laid down in Sch. D, and that Case V was applicable, and not Case I. There was no absolute exemption from income tax.

In the present case by sub-s. 2, s. 53, the method of computation is to be that primarily of the Income Tax Acts, 1918, but it is definitely stated that the computation is to be made whether the profits are assessable to income tax under Sch. D to that Act or not. Whether they are in fact so assessable or not, still the method of computation is to be primarily that of Sch. D and that Schedule as thereafter modified. Now if we look at the *Egyptian Hotels Case* (1), it is clear that in that case the Egyptian Hotels Company was liable to taxation under Sch. D, and the reference to it really does not carry the appellant company any distance at all.

For these reasons I am of opinion that, as expressed in

(1) [1915] A. C. 1022.

Rowlatt J.'s judgment and for the reasons also given by Lord Clyde in *Saxone Shoe Co. (France) Ld.* v. *Inland Revenue Commissioners* (1), there is really no ground or substance in this appeal, and it must be dismissed with costs.

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WARRINGTON L.J. I am of the same opinion and for the reasons expressed by Rowlatt J., by the four learned judges in the Court of Session and by the Master of the Rolls, and I see no reason for repeating them in my own words.

ATKIN L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitors for appellant company: *Dale & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

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Police—Police Protection—Agreement to pay for—Legality of.

Where under particular circumstances police protection is necessary, although the police authority are bound to provide sufficient protection without payment, if the party applying for it requires it to be provided in a special and particular form which is not necessary he may be required to pay for it.

On the occasion of a strike a colliery manager applied for police protection for his colliery, and insisted that it could not be efficiently protected except by billeting a certain number of policemen on the colliery premises. The police authority were ready and willing to provide sufficient police protection in another way, but refused to billet their men at the colliery except on the terms of the manager agreeing to pay for the police force so provided at a certain specified rate:—

Held (by Bankes and Scrutton L.JJ., Atkin L.J. dissenting), that there was nothing illegal in the agreement, nor was it void for want of consideration.

APPEAL from a judgment of Bailhache J. on the trial of an action without a jury.

(1) 1923 S. C. 734.

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The action was to recover a sum of 2200*l.* 11*s.* 10*d.* for the services of police specially supplied by the plaintiffs for the defendants at their request and by agreement with the defendants. The defendants are the owners of a colliery situate about two miles from Swansea. There had been a general colliery strike in South Wales in 1921, beginning in March and continuing down to the beginning of July, when a general settlement was arrived at. But work was not resumed at the defendants' colliery, because they had paid their men before the strike at a higher rate than that in force in other collieries, and on the settlement being arrived at refused to pay them thenceforward more than the general rate then agreed to. The defendants employed about 1000 men. On July 7 there was a hostile demonstration of the men, to the number of 500 or 600. On the 8th the men's committee saw Mr. James, the manager of the defendants' colliery, and told him they were going to get the "safety men" out, as that had been decided on at a mass meeting. If they had been withdrawn the mine would have been flooded. As none of the safety men arrived to work on the 9th Mr. James went to see the police superintendent of the district, Colonel Smith, and requested police protection. He insisted that 100 police would be required for the purpose, and that it would be necessary to have them billeted at the colliery, otherwise the safety men, who were frightened, would not come back. Colonel Smith said that he was prepared to furnish efficient protection in a different manner—namely, by keeping a mobile force in the neighbourhood who could, on a warning of danger being given, be speedily transported by motor cars to any point at which they were required; but if the police were to be billeted in the colliery 70 men would be amply sufficient. Eventually Mr. James agreed to 70 men being sent, and he signed a form of requisition in which he agreed on behalf of the defendants to pay for the services of the men so provided at certain specified rates—that is to say, inspectors 23*s.*, sergeants 18*s.*, and constables 14*s.* a day—and also to pay for their railway fares, and provide them with food and

sleeping accommodation. On the police being billeted in the colliery the safety men returned, but they would not have done so if the police had not been billeted there. The police remained at the colliery until the end of the strike. The defence to the action was that there was no consideration for the promise to pay for the services of the police, it being the duty of the defendants to supply police protection without payment, and that the agreement was signed under compulsion, the signature being extorted colore officii. The defendants counterclaimed for 1330*l.* 4*s.*, the cost of housing and feeding the police so supplied. Bailhache J. held that although the defendants were bound to provide sufficient police protection, if they were prepared to do so in their own way but the defendants required it to be provided in another and special form, the defendants must pay for it. He accordingly gave judgment for the plaintiffs on the claim and dismissed the counterclaim.

The defendants appealed.

Montgomery K.C. and *A. T. James* for the appellants. In the absence of any statutory authority to make it this charge for the services of the police is illegal. The Home Office authorities no doubt in two memoranda issued respectively in January, 1892, and December, 1921, headed "Charges for police lent to private employers," assume that such charges may be lawfully made, but there is no warrant for such an assumption. On being invited by the present defendants to indicate the statutory authority on which they relied for the charge, they referred to s. 19 of the County Police Act, 1840 (3 & 4 Vict. c. 88), but that section only applies to special constables, who are specially sworn in for a particular occasion, which the constables supplied in the present case were not. This illegality of charges for police services extends even to special services which are in excess of what the policeman's ordinary duty requires him to render. But the services which the police in fact performed in the present case were nothing more than it was their duty to perform. Colonel Smith admitted that the safety men would not have remained

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at work "if there had not been police protection always there," that is, unless the police had been kept permanently at the colliery. He thought that the men were over anxious, but there is no finding by the judge that if the police had been withdrawn from the colliery the safety men would have been acting unreasonably if they had left. Moreover, there was no evidence that any greater expense was caused to the plaintiffs by the billeting of the police in the colliery than would have been involved by the employment of them in the way proposed by Colonel Smith. But the judge thought it was sufficient to fix the defendants with liability that the form of the protection afforded was different from that which the superintendent offered. Even if the above contention is wrong, and if the particular protection involved greater expense, the plaintiffs cannot recover for the excess if the different parts of the expense are not severable. In that event, if a charge for part would be bad, nothing can be charged for. On the other hand, if the expense is severable the defendants ought to be liable only for the excess, whereas the judge has held them liable for the whole. If there is no legal authority for the plaintiffs to make the charges in question the fact that the defendants' manager contracted to pay them is immaterial, for there was no consideration to the promise. In *Wathen* v. *Sandys* (1), where a sheriff sued in indebitatus assumpsit for work and labour and materials provided in the erection of hustings and other expenses incidental to an election, which the candidates had agreed to pay, it was ruled that the sheriff could not recover any part of the expenses which were necessarily incurred by him in executing the writ and making the return, for that was part of his duty as sheriff; nor could he charge for constables employed in guarding the booths, for the sheriff is bound to preserve the peace of the county. In *Steele* v. *Williams* (2) a charge by a parish clerk for a number of extracts made by the defendant from the parish registers was held illegal, and payment made to the clerk in respect of them could be recovered back, for it was not a voluntary payment, but

(1) (1811) 2 Camp. 640. (2) (1853) 8 Ex. 625.

extorted colore officii. And *Morgan* v. *Palmer* (1) is to a similar effect.

Vaughan Williams K.C. and *Trevor Hunter* for the respondents. It is not disputed that under the circumstances of this case a certain degree of police protection was necessary, and that it was the duty of the police to provide it without payment. It is a question of fact whether that duty could not have been efficiently performed otherwise than by billeting the men in the colliery, and the judge accepted Colonel Smith's view. If a particular form of protection is not necessary the ratepayer cannot require it to be provided in that form without paying for it, and there is nothing illegal in an agreement by him to do so. For a long time past it has been common practice for the owners of racecourses or football grounds to secure the special services of police to keep order on the occasions of race meetings or football matches, and their liability to pay for those services has never been questioned. So, too, members of the detective force are commonly employed at wedding receptions to guard the presents, on the terms of their being paid for their services. The police have no right as such to enter upon private premises, and their presence there cannot be in the discharge of their ordinary duty. It can only be by agreement with the occupier. In view of this common practice the Home Office have issued a schedule of charges to be made for the services of police lent to private persons. In *Glamorganshire Coal Co.* v. *Glamorganshire County Council* (2), where one of the plaintiffs, the Powell Duffryn Steam Coal Co., had asked for 24 police on special duty, it never occurred to any of the judges to doubt that the applicants would have to pay for them. Phillimore L.J. said (3) that such a request "means that they would have to pay the usual charge for police sent on special request for private protection." Then if the agreement by the defendants to pay was binding, the Council are entitled to charge the whole cost of billeting the men in the colliery

(1) (1824) 2 B. & C. 729. (2) (1916) 114 L. T. 717.
(3) 114 L. T. 718.

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without making any deduction for their wages and keep which the Council would have had to pay if the men had not been there. The calculation of the value of the excess service over and above what the ratepayer is entitled to would be impracticable, therefore if the Council are entitled to charge anything they are entitled to charge for the whole.

Montgomery K.C. replied.

Cur. adv. vult.

1924. Feb. 25. The following written judgments were delivered :—

BANKES L.J. This appeal raises a question of considerable public importance in reference to the right of a county police authority to demand payment for special police services. The appellants are the owners of collieries in the neighbourhood of Swansea. In July, 1921, the appellants' workmen were on strike, and, having succeeded in getting the safety men at the collieries to come out, they were doing their best to keep them out. The position at the collieries on July 9 was very critical. On that day an interview took place between the manager of the collieries and the police superintendent of the district. Unless the safety men could be persuaded to return there was imminent danger of the collieries being flooded. The manager and the superintendent did not agree as to the amount of police protection which was necessary under the circumstances ; the manager contending that it was impossible to get the safety men back and to protect the collieries from flooding without a resident garrison of police upon the colliery premises, the superintendent contending that he could afford complete protection both to the safety men and to the collieries without providing such a garrison. The manager was informed that if he required the resident garrison he would have to sign a requisition for special service of police, under which he would make his employers liable for the cost of rationing the men and for paying them according to the scale of charges set out in the requisition form, as well as for providing sleeping

accommodation. This the manager expressed his willingness to do, and he signed a form of requisition for 1 superintendent, 2 inspectors, 2 sergeants and 66 constables for special duty as from 6 P.M. on July 9. The force was supplied, and they remained at the collieries until August 29 following. According to the scale, the pay of the men amounted to 2200*l.* 11*s.* 10*d.*, and the cost of billeting them to 1330*l.* 4*s.* The action was brought to recover the first mentioned sum, and the appellants counterclaimed to recover the cost of the billeting which they had paid.

It is material to consider the form of the action, and the case which was fought in the Court below. The plaintiffs sued upon the agreement contained in the form of requisition, by the terms of which the manager guaranteed payment on the conditions specified in clause C of the second schedule. The defendants did not dispute the manager's authority to enter into the agreement or contend that the charges set out in the schedule were extortionate; nor did they contend that the charges were inapplicable to a case where the county employed their own regular police, and were only intended to apply in cases where police were imported from another county or specially enrolled, or that the charges included duties some of which the police were bound to discharge without payment. The only defences were (*a*) that there was no consideration for the agreement, and (*b*) that the agreement was made and signed under compulsion, and the request alleged in the requisition was exacted as a condition of the police carrying out their legal duties and obligations.

These two defences cover much the same ground, and in dealing with them it is necessary to consider what the legal duties and obligations of a county police force are. The force as a whole is a statutory body. It owes its existence to the provisions of the County Police Act, 1839, which provides for the appointment of a chief constable and for the appointment by him of subordinate officers and constables. Sect. 8 of that Act provides that the chief constable and other persons so appointed shall be sworn as constables, and

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shall have all the powers, privileges and duties throughout the county which any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made. The section also provides that every provision (with certain immaterial exceptions) of the Special Constables Act of 1831 shall be deemed to extend to the constables appointed under this Act. The two classes of constables which are here apparently dealt with in reference to their constablewick are the petty or parish constables, whose principal duty was the preservation of the peace, and the special constables appointed under the Act of 1831, whose oath bound them to the best of their power to cause the peace to be kept and preserved, and to prevent all offences against the persons and properties of His Majesty's subjects. A constable of whatever rank could, no doubt, be indicted for a failure to perform his statutory duty, as the civilian was in the case of *Reg.* v. *Brown* (1), where the indictment charged the defendant with a failure when called upon to aid and assist a constable in the preservation of order. There is, however, no absolute standard of duty, and no definition of the exact amount of police protection to which an individual is entitled. Every case must depend upon its own circumstances. In the present case any real difficulty is, in my opinion, cleared out of the way by the finding of the learned judge, with which I am not prepared to disagree, that in the difference of opinion between the manager and the superintendent as to the nature and extent of the protection necessary, the latter was in the right and the manager in the wrong. In his judgment the learned judge says this: "Colonel Smith says that if the matter had been left entirely to him without this requisition, he could have protected this colliery and he would have protected it quite amply, but in quite a different way, and I accept the evidence that that is so." The learned judge saw this witness and was, therefore, able to form an opinion as to his experience, judgment, and reliability. The witness was speaking on a very technical question, about which he was not pressed as to the grounds on which he based

(1) (1841) Car. & M. 314.

his opinion, or how or from what places he was intending to summon his mobile force. The learned judge accepted his judgment in the matter, and under these circumstances I think that this Court must accept it also.

The case, therefore, presents itself as one in which the police authority, as represented by Colonel Smith, the local superintendent, was prepared to do its duty and to provide adequate and complete police protection. Upon this footing the case for the appellants as pleaded and as fought, in my opinion, fails, as there was consideration for the agreement, and the agreement was not exacted as a condition of carrying out a legal duty or obligation.

During the argument another view of the case was presented. It was suggested that the moneys sought to be recovered included to some extent payment for services which the police were bound to render without payment. To that extent, therefore, it was said that the agreement was an illegal one, and as the contract was not severable, the entire agreement was unenforceable. It was also said that it was illegal to make any charge for police services of any kind, however special. To test this last contention I put the case of an extremely nervous person who was unable to sleep for fear of burglars, and who therefore applied for a constable to be stationed on point duty in the street all night opposite his house. If his request was granted on condition that a payment could be made for the special service, Mr. Montgomery contended that the contract to make the payment was illegal. I cannot accept that view. The service upon which the constable would be employed is police service, and unless it is shown that the granting of the request deprives other people of a reasonable amount of police protection, I can see nothing objectionable, still less illegal, about the transaction. If people for their own pleasure, or for their own profit, or because, in special cases, of their peculiar circumstances, desire special police service, I see no reason why they should not be called upon to pay for it. The Legislature has never given any indication that there is anything objectionable in requiring a person, or a

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public body, applying for special police service, to pay for that service. I refer to two instances only: the Act of 1838 (1 & 2 Vict. c. 80), which provided for the payment of constables for keeping the peace near public works, and s. 19 of the Act of 1840 (3 & 4 Vict. c. 88), which provided for the appointment of additional constables at the cost of individuals. It is true that these provisions deal with the appointment of additional constables, but if it is not contrary to public policy to require the person who requires the additional constable for special service to pay for that service, it is difficult to see why it should be against public policy to require payment for the special service of a regular member of the force, provided, of course, that the supply of the constable does not deprive any one of the amount of police protection which he or she may legitimately claim. It is indeed easy to realize that the practice of requiring payment for special police service is to the public advantage. An effective police force requires a margin of reserve strength in order to deal with emergencies. To employ that margin of reserve on special police service for payment, when not otherwise required, appears to me to be wholly praiseworthy, and to be to the advantage both of those who pay for the police force and those whose interest it is that the peace should be kept and their property and persons protected. The practice of requiring payment for the services of constables who have been lent was expressly recognized by s. 16, sub-s. 1 (*e*), of the Act of 1890 (53 & 54 Vict. c. 45), since repealed, as being no longer necessary. I can see nothing unlawful or against public policy in this particular case in demanding payment for the special police service which was rendered.

I think, therefore, that this defence fails, even if it is open to the appellants, which I doubt. The question was not gone into to what extent, if at all, the presence of the resident garrison relieved the police force of any of the expense of what the superintendent describes as his mobile force. The presence of the garrison, no doubt, rendered the police task easier, but the witnesses described how it was still necessary

to protect the safety men's homes and to bring up a force of police to deal with bodies of strikers. These matters were not gone into at the trial and cannot be investigated in this Court.

Upon the facts as found by the learned judge, it does appear that the offer of the superintendent to provide police protection was a sufficient offer. In other words, he offered to provide without any payment the amount of police protection which, under any view of the law, he could have been required to provide.

Under these circumstances the principle underlying such cases as *Steele* v. *Williams* (1); *Snowden* v. *Davis* (2); and *Morgan* v. *Palmer* (3) has, in my opinion, no application to the present case. The demand of the superintendent colore officii was not for payment for something which by law he was compellable to provide without payment. It is true that what he was asked to secure was adequate protection, something which he was bound to provide without payment; but when the manager insisted upon the securing of that protection by means which were in excess of what was necessary, he must, in my opinion, pay the reasonable cost of providing the form of protection which he insisted upon having. As I have indicated above, no point was or is made by the defence that the charge made was an extortionate one.

For these reasons I consider that the judgment of the learned judge was right, and the appeal must be dismissed with costs.

SCRUTTON L.J. When in 1921 the general strike of miners in South Wales was settled, a local strike still continued at four of the defendants' collieries in South Wales. It was important that the safety men, who look after the pumps and other salvage machinery at the colliery, should continue working, but the men on strike made great efforts to get them to cease work. The colliery manager, Mr. James, was of opinion that the proper way to keep the safety men at work was to billet them at the colliery and to keep also a contingent

(1) 8 Ex. 625. (2) (1808) 1 Taunt. 359.
(3) 2 B. & C. 729.

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Scrutton L.J.

of police constantly in the colliery, lodged and fed there. He accordingly asked the District Superintendent of Police, Colonel Smith, for 100 men. Colonel Smith would only give him 70 men, and asked him to sign the requisition form which provides that the person requesting the supply of police shall pay for their services, lodging and food. Mr. James had known he would be asked to sign this document and had been authorized to sign it if necessary. He did sign the document, and made no protest or objection to it. The form contained a guarantee of payment for the police, as provided for in the conditions. The police authorities claimed the amount so calculated.

The colliery company, the defendants, pleaded that as the police were supplied to carry out the legal duties of the police authorities, there was no consideration for the contract, or, in other words, that as persons with a legal duty claimed colore officii payment for services they should perform as part of their legal duties, the sum paid was paid under compulsion and could be recovered back. If the defendants were under a legal obligation to pay, they would not contest the correctness of the charges claimed. The police authorities admitted that they were bound to afford reasonable protection, and said they proposed to do it by a mobile force available for all the five collieries to be protected, but did not think the stationary garrisons of police were necessary. The learned judge accepted the evidence of Colonel Smith that "he would have protected this colliery amply, but in a different way," and held that as the colliery company was asking for special protection in excess of the sufficient protection which the police were prepared to provide, their express promise to pay was valid. He also held that in the absence of any express promise one would be implied. The colliery company appeal.

Before us counsel for the colliery company argued an important point that had not been argued in the Court below—namely, that all charges by police authorities for performing their duty of protecting the public were illegal. There is no doubt that for many years police authorities have furnished

for payment, at the request of individual citizens, policemen to perform duties in the nature of maintaining order or preventing crime. Instances are where valuable property is temporarily and temptingly exposed to mixed assemblies, as at weddings, to guard the presents, or sales or bazaars; or where assemblies are likely to produce disorder, as at races, or football meetings, or to regulate traffic to private festivities, such as dances. It would take very clear authority to persuade me this is illegal.

Obviously the police authorities cannot be expected to, and cannot, protect every citizen completely against possible, even anticipated, crime. The cost would be prohibitive; the premium of insurance would be over 100 per cent. I am excluding cases of specific information of definite crime, and only referring to apprehensions of possible crime. And it may well be that if a citizen is merely apprehensive and he can be given at his request protection against what he apprehends without detriment to more reasonable police duties, he may be given that protection at his own expense, the money paid going, in the first instance, to the police authority. I notice that in the *Glamorganshire Case* (1) the colliery company arranged for 24 police on special duty at their premises; and in the Court of Appeal (2) Phillimore L.J. says of these police: "This means that they would have to pay the usual charge for police sent on special request for private protection, and they also agreed to house and feed them." As this charge was not in dispute in that case the remark was obiter, but none the less valuable. The Home Office recognizes the practice and the charge and provides for it under reg. 76, made under the authority of s. 4 of the Police Act of 1919. (3) Sect. 16 of the Police Act, 1890 (4), speaks of constables whose services are lent in consideration of payment, which payment is to go to the Police Pension Fund. Sect. 10 of the County Police Act, 1839 (5), appears only to prohibit individual officers from receiving

(1) 112 L. T. 604.
(2) 114 L. T. 718.
(3) 9 & 10 Geo. 5, c. 46.
(4) 53 & 54 Vict. c. 45.
(5) 2 & 3 Vict. c. 93.

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payment for work other than police work, such as appearing in the Policemen's Chorus in the Pirates of Penzance. It does not appear to me to prohibit the police authorities from asking people, who desire police protection, which is rather a luxury than a reasonable necessity, to pay for it if the service can be rendered without prejudice to the public duties of the police reasonably construed. The appellants' first point of total illegality of any charge for work which might come within the scope of authorized employment of the police therefore fails. A subsidiary point was that if charge for special work were justified, it could only be for the excess of that work over the services that the police were bound to render. This contention appears to be excluded by the terms of the appellants' admission in the pleadings, but I should have thought it was impossible to sustain. To attempt to estimate what part of special service A is equivalent to an entirely different and smaller service B, appears to me to be impossible. The remaining questions raised by the colliery company were that the protection intended to be rendered by the police authorities was either quite inefficient, or if efficient was of the same efficiency as that desired by the colliery company, so that no charge should be made for the latter, which was exactly within the duties of the police.

The difficulty was the protection of the safety men. If they lived at their homes and went backwards and forwards they were exposed to "peaceful persuasion" of a very belligerent character on their journey or while at home. The risk of this while on their journey would be avoided if they stayed at the colliery night and day; and the police appear to have kept demonstrations at their houses in order by accompanying the processions. If they were billeted in the colliery there was still the risk of attacks on the colliery by the strikers, which was a serious matter, which the police were bound to provide against. The police proposed to do this by a small guard at the colliery communicating by telephone with a mobile force of police who could be quickly brought to any threatened point by motor lorries,

and could accompany any procession which was formed. The colliery company said this was not enough, and they should have a fixed garrison of considerable numbers in each colliery. The learned judge below has accepted the evidence of the police that the mobile force method could have been followed and would have given ample protection. I am not satisfied that he was wrong, and I am impressed by the difficulties of the Court interfering with the judgment of the police authorities where, in fact, no danger has occurred. It is quite possible that the safety men were very apprehensive, and I appreciate that people who were not in danger must not be too critical of those who were. But while the subject should be protected by the State, the State is entitled to expect the subject to show reasonable self-control and courage, and I think the protection offered by the police to people billeted in the colliery should have been sufficient without requiring their permanent and constant presence. I entirely agree with the passages in the judgments of Phillimore and Pickford L.JJ. in the *Glamorganshire Case* (1) on the duty of the police in labour disputes to afford sufficient and adequate protection to those who desire to work in their own way; the police must not stand neutral, in the sense of not interfering with attempts by one side to coerce the other, however neutral they should be in the sense of not forming judgments as to the correctness of the case of one side or the other. But in protective measures taken beforehand, I think the police are entitled to require that reasonable fortitude should be shown by those who are exposed to possible risks, and are not bound to afford so much protection that even the most nervous person need have no alarm.

Not feeling able to interfere with the findings of fact of the judge below, I think this appeal must be dismissed with costs.

ATKIN L.J. This case raises a question of considerable public importance, whether the police authorities are entitled to charge a member of the public with the cost of police protection rendered to him at his request.

(1) 114 L. T. 726, 727.

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The facts are that after the settlement of the general strike of coal miners in 1921, the men employed at three of the plaintiff company's collieries at Garngoch near Swansea refused to return in consequence of a dispute as to wages, which was confined to them and their employers, and to the workmen and employers of the adjacent colliery, the Tirdonkin Colliery. About 1000 men were employed at the plaintiffs' collieries. On July 4, 1921, when the general resumption of work took place, these men remained out. Feeling ran high. On Thursday, July 7, a crowd of 500 to 600 men assembled at No. 1 Colliery, and a similar demonstration was announced for Friday, July 8. On Thursday a deputation asked the safety men to come out; on the Friday some of the safety men did not come to the colliery. On that day a similar crowd assembled, were very threatening, and intimated that they were going to have all the safety men out. One of them had been pulled off his bicycle on his way to the colliery. On the Friday afternoon the safety men decided not to return the next day, and on the Saturday absented themselves. Full evidence of the exact conditions was not given, for in the course of examination of the second witness for the plaintiffs the judge protested against having "all these details," and said that he did not suppose it was disputed that the police protection was required, to which he got the response from leading counsel for the defendants, "I do not dispute that, my Lord. We had to supply police protection to prevent a breach of the peace." The formal admission was eventually made that "at this colliery at this particular time police protection in some shape or form was required." Upon that being given counsel for the plaintiffs called no further evidence on the point.

This being the condition of things, the colliery manager, Mr. James, called upon Colonel Smith, the police superintendent of the district. The police had been in touch with the disturbance certainly on the Thursday, the 7th, and on Friday the superintendent had attended with 34 extra men, and at Tirdonkin had met a crowd of 800 strong led by three rows of women carrying babies in the front rank. The crowd

had been hostile to the management and police. It is to be observed that the police dispositions on this day had not inspired sufficient confidence in the safety men to induce them to return on the Saturday. Police protection was discussed between Colonel Smith and Mr. James. As I have said, it is admitted that it was necessary. Mr. James asked to have police billeted in the collieries. I do not think it is quite clear what was said by Colonel Smith. Two years had elapsed between the interview and the trial, but I think it is to be taken that he told Mr. James that he could always protect him. Colonel Smith, in evidence, said that he preferred having a mobile body of police with watchers at the different points of danger. He probably told Mr. James this, but it did not meet Mr. James's view of the needs of the situation, and as Colonel Smith said, "Mr. James is the head or a very important official in a big firm, and if he asks me for something and I can give it I do so readily, because he is the type of man who ought to know what he wants." Eventually Colonel Smith agreed to Mr. James's request, telling him that it was special duty and producing a requisition form, which Mr. James signed on being told that it was the usual procedure. In pursuance of the agreement contained in the requisition form, 2 inspectors, 4 sergeants and 64 constables were billeted at the collieries, Nos. 1 and 3, from July 9 to August 29, though the force was diminished towards the end of the period. The rate charged was 23*s.* a day for inspectors, 18*s.* a day for sergeants, and 14*s.* a day for constables. The claim in the present action is for 2200*l.* 11*s.* 10*d.*, being the charges on that scale, and the defendants counterclaim for 1330*l.* 4*s.*, the cost of billeting the force at an average rate of 8*s.* 11½*d.* per man per day. It only remains to be said that a few days after the arrival of the police the safety men returned to the colliery, where they also were billeted, and maintained the colliery in safety until the strike was ended and work was resumed.

The defence to the action is (1.) that there was no consideration for the promise to pay; and (2.) that the promise was exacted by the plaintiffs as a condition of carrying out

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their legal duties and obligations. The case was argued before us on the two points, that there was no consideration, and that the agreement was void, as being against public policy, and I think that both points are sufficiently raised by the pleadings. It is necessary, therefore, to consider whether the police are entitled to charge for their services under any and what circumstances, and for this purpose to review some of the enactments relating to the powers and duties of the police.

The county police were established by the County Police Acts of 1839 and 1840—made compulsory by the County and Borough Police Act of 1856. By the Act of 1839 constables appointed under the Act were given all the powers and duties of a constable at common law. By s. 6 they are under the general disposition and government of the chief constable, subject to the lawful orders of the justices in general or quarter sessions assembled, and to the rules established for the government of the force. The police, therefore, are a statutory force, having transferred to them the common law duties of a duly appointed constable. Their duties have been defined in the *Glamorgan Coal Co.* v. *Glamorganshire Standing Joint Committee* (1) by Bankes J. as including "the preservation of the peace, the protection of the inhabitants, and the safeguarding of property within the county." In the same case in the Court of Appeal (2) I find the following passages: per Phillimore L.J. (3): "Nor can I pass over the contention frequently made in the course of the proceedings that it was the duty of the plaintiffs to protect themselves against rioters. Such a contention strikes at the basis of all civilised society and logically leads to private war. The subject pays rates and taxes to insure himself protection against domestic as well as foreign foes, and it is the duty of the Government to provide him with it." Per Pickford L.J. (4): "The position taken by the Standing Joint Committee seems to me entirely untenable and was not insisted on before us. They are the police authority and

(1) [1915] 1 K. B. 483.
(2) [1916] 2 K. B. 206.
(3) [1916] 2 K. B. 226.
(4) Ibid. 229.

have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty." Per Bray J. (1): "The real reason for the refusal of the County Council to pay these claims seems to have been that they thought that the colliery proprietors ought to pay for having the lives of their employees and their property protected. The colliery proprietors have to pay rates like other persons, and have a right to have the same protection as other persons living and owning property in the county." The police then are subject to a public duty to preserve the peace, to protect the inhabitants and to safeguard property. Can they for their services make a money charge to the individual whose life or property is protected in pursuance of that duty? It appears to me that at common law it would be plainly contrary to law to charge for the performance of a public duty, and that the onus is on the person entrusted with the duty to establish some exception to the general rule, either by statute or otherwise, validating such a power. That a sheriff may not charge for the exercise of his common law duties anything other than charges allowed by statute is clear: *Dew* v. *Parsons*. (2) In *Morgan* v. *Palmer* (3) the plaintiff had been required to pay to the Mayor as a condition of renewal of a publican's licence a fee of 4*s*., which had been regularly

(1) [1916] 2 K. B. 242.

(2) (1819) 2 B. & Al. 562.

(3) (1824) 2 B. & C. 729.

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demanded and paid for 65 years. He was held entitled to recover the fee back, Bayley J. saying (1): "As a justice he had a public duty to perform, and had no right to any remuneration for it"; and Littledale J.: "The granting a licence was a public duty imposed by law, and for the execution of that he had no right to any payment." So in *Steele* v. *Williams* (2) a parish clerk had made an excessive charge for taking extracts from a parish register. It was held that the money could be recovered back on the ground that it was "an illegal act on the part of the defendant," per Parke B. (3); that he had "illegally taken money under colour of an Act of Parliament," per Martin B. (4)

The general proposition was not disputed before us, but the argument was that there was an intermediate sort of service which fell short of the performance of a duty, but was within the scope of employment of the police for which they were entitled to charge the individual. The duty of the police, it is said, is to give a general protection to the public, but if an individual asks for special protection for himself, then under some circumstances he must pay for it. What the precise circumstances are which create the obligation to pay were not clearly defined in argument, and I found it difficult to get a clear conception of them. The learned judge says: "When a colliery company or an individual requisitions police protection of a special character for a particular purpose, he must pay for it, and he must pay for it whether he makes a contract to pay, or whether he does not." A promise to pay would be implied under those circumstances. I suppose that if an individual asks for police protection, he generally does it for a particular purpose: here it was to protect his servants from violence and his property from injury. Protection of a special character presumably means something more than protection directed to individual needs rather than to the general interests of the public. Presumably the learned judge had in his mind

(1) 2 B. & C. 735, 737.
(2) 8 Ex. 625.
(3) 8 Ex. 630.
(4) 8 Ex. 632.

the request to have police stationed in private grounds and appropriated exclusively for the time to the protection of the individual. But the duties of the police extend to the prevention of breaches of the peace and the commission of crimes on private property, and it cannot be suggested that they are not bound to enter private property for those purposes, at any rate at the request of the occupier. I put the case in argument that a householder learning that his house was to be burglariously entered the next night by two or three criminals asks for police assistance, and asks that the police should be stationed within the house to apprehend the criminals there, while the police authority think the more efficient way is to station the constables outside. Should the police authority yield to the householder's request, would he have to pay for the services of the police? Counsel for the Glamorganshire police force courageously and logically said "Yes." If the emergency has arisen, I cannot think that the test of liability to pay can be whether the police comply with a request to render the particular protection in a manner different to that which their trained judgment would approve. Theirs is the responsibility. If the request is one which is improper, they should not comply with it. If they do comply with it, they adopt it as a proper means, though possibly not the best means, of performing their duty. One understands the suggestion that the police may be asked to give protection which they cannot give, because it would be beyond their resources without leaving the other members of the public insufficiently protected. The obvious course is to refuse such protection, or under the appropriate powers of the Police Acts procure more men for the emergency. I cannot myself understand the legal position which enables the police officer to say, "I cannot endanger the general public unless I am paid for it, but if I receive full pay and allowances the general public may take their risk." In the present case 70 men of the county force were billeted in the collieries for six or seven weeks, though doubtless they could at any time have been recalled should an emergency have arisen elsewhere. This involved the

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appropriation to this special duty of an appreciable percentage of the county force. The police authorities of the county cannot have thought that they were exposing the rest of the inhabitants to any danger. Colonel Smith says he knew the chief constable had plenty of men available by that time. Either they were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or, which no one suggests, they were at the request of an individual doing something which it was not their duty to do, in which case it seems to me both public policy and s. 10 of the County Police Act, 1839, make the contract illegal and void. In this view of the case it becomes unnecessary to consider what the position would be if the police had been entitled to charge for part only of the services rendered. The promise is for one sum per diem, and appears to me not to be severable, and the defence of illegality must therefore prevail. I have dealt with this case on the agreed basis that on the occasion some form of police protection was necessary, and have assumed, as found by the learned judge, that the form asked for by the defendants was not that which the police considered best. In view of the argument of counsel, it seems to me irrelevant to consider whether the safety men showed lack of courage in leaving the colliery. It is perhaps easier to be heroic in London two years after the occurrence than it was at Gorseinon in July, 1921. I have not, therefore, thought it necessary to deal specially with the cases suggested in argument where in circumstances in which no special risk of violence or injury is apprehended an individual asks for and obtains police protection which would not be granted in any form, except upon a promise to pay. Such a case may be different, but as far as I can see at present there is nothing to distinguish it from the present in its legal consequences.

So far I have dealt with the legal question upon general principles, but I desire to refer to one or two statutory provisions which seem to me to fortify the above conclusion. Before the Police Act of 1839 there were previous statutes in existence conferring upon the justices the power of appointing

special constables on occasions of emergency. It will be sufficient to mention the Special Constables Acts, 1831 (1) and 1835. (2) By s. 13 of the Act of 1831 such special constables could be remunerated by the justices out of the county rate, though the emergency arose in any particular parish or place. There was no power of imposing the expenses on any parish, place or individual. By 1 & 2 Vict. c. 80, "An Act for the payment of constables for keeping the peace near Public Works," it was provided that if the appointment of special constables had been occasioned by the behaviour of persons employed upon any railway, canal or other public work, the justices could direct the expenses of such constables to be paid by the undertakers of such public works, subject to disallowance or reduction by the Secretary of State, in which case the excess fell upon the county rate. Up to 1839, therefore, there was no provision for individual requisition and payment. By s. 19 of the County Police Act, 1840, it was made lawful for the chief constable "with the approval of the justices of the county in general or quarter sessions assembled," on the application of any person showing the necessity, to appoint and swear in any additional number of constables "at the charge of the person by whom the application shall be made" for such time as he shall think fit, subject to one month's notice by the person applying to discontinue the additional constables. It will be noticed that this power only extends to additional temporary constables, that the decision as to the appointment and the appointment is to be made by the chief constable, and that the appointment can only be made with the approval of the justices, and that "necessity" must be shown. It is only under these conditions that the individual can be charged. Such a series of statutory checks seems to me to be inconsistent with the notion that side by side with these powers there subsists an implied power to agree with the individual to give him for reward police services which the police are not otherwise bound to render. On principle, therefore, I

(1) 1 & 2 Will. 4, c. 41. (2) 5 & 6 Will. 4, c. 43.

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come to the conclusion that the power of the police to charge for their services cannot be supported. But one cannot conceal from oneself that from the administrative point of view much may be said for allowing the police authorities to do what they did in this case under proper safeguards. And there can be no doubt whatever that for many years past the police authorities have been in the habit of "lending" constables to public institutions and private individuals on the terms of payment. We are told that it is common in the case of public departments and in the case of race meetings, football matches, and weddings. Home Office circulars have been referred to which recognized the practice, and directed the amount of payment, which in some cases includes a proportionate charge for police pension; and in the Police Act of 1890, s. 16, sub-s. 1 (*e*), now repealed, there is a provision for carrying to the pension fund of every police force "such proportion of any sum received on account of constables whose services have been lent in consideration of payment" as the police authority may consider fair. Nevertheless administrative practice cannot create a right to charge for public services, and as to the Act of 1890, if in fact sums were being received for constables lent, it was no doubt right to appropriate part to the pension fund; but I cannot think that a financial provision passed alio intuitu can be sufficient to create a right to charge for public services, if no such right existed before. The explanation of the practice probably is that it was founded upon s. 19 of the Act of 1840, and that as the police authorities found it necessary to keep an establishment which permitted of reserves, it was thought expedient to employ the reserves on terms of payment rather than appoint additional constables each time an emergency arose. For this, however, in my opinion, there was no statutory authority. The checks laid down by the Legislature in 1840 have in fact been ignored, and if the practice is to be put on a legal basis, it should be done by the Legislature, who can make such provision as they think fit for the protecting of the individual from paying for the performance of public duties.

For these reasons I think that the appeal should be allowed and judgment entered for the defendants on the claim, and a new trial ordered on the counterclaim.

Appeal dismissed.

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Solicitors for the appellants: *Kensholes & Prosser, Aberdeen.*
Solicitors for the respondents: *Andrew & Thompson, Swansea.*

J. F. C.

MICHAEL ABRAHAMS, SONS AND COMPANY *v.* BUCKLEY.

1924 *March* 3, 24.

[1923, A. 972.]

Husband and Wife—Wife's Solicitor's Costs of matrimonial Proceedings—Liability of Husband—Necessaries—Conditions of Solicitor's Right to recover.

Where a solicitor conducts matrimonial proceedings on behalf of a wife against her husband, it is not a condition precedent to the solicitor's right to recover his costs thereof from the husband that he show that the proceedings were necessary or that they had a successful issue. It is sufficient that he acted on reasonable grounds, made adequate inquiries, and showed proper diligence and care.

Dicta of Mathew J. in *Taylor* v. *Hailstone* (1882) 52 L. J. (Q. B.) 101, 102 and of Turner L.J. in *In re Hooper* (1864) 2 D. J. & S. 91, 100 to the contrary not followed.

ACTION tried by McCardie J.

The plaintiffs, Michael Abrahams, Sons & Co., a firm of solicitors, claimed about 125*l.* in respect of costs incurred on behalf of the defendant's wife in conducting matrimonial proceedings by her against him. The facts are stated, so far as material for the present purpose, in the judgment of McCardie J.

Giveen for the plaintiffs.
Hilbery for the defendant.

1924. March 24. MCCARDIE J. read the following judgment:—The plaintiffs, who are solicitors, claim from the

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defendant, Mr. Abel Buckley, a sum of about 125*l.* for work done and moneys expended under circumstances I will briefly state. I desire to avoid, so far as possible, the infliction of unnecessary pain.

In March, 1920, the defendant's wife called on the plaintiffs for professional advice. She saw Mr. Harry Abrahams. He took from her a full statement of her allegations of cruelty and adultery against her husband. Mr. Abrahams has had a wide and long professional experience of matrimonial litigation and disputes. He questioned Mrs. Buckley closely. He tested the details. He formed the view that she was telling him the truth. Mr. Abrahams decided that it was necessary (inter alia) to secure adequate proof of the adultery alleged. He at once instructed a firm of inquiry agents to observe and report. I have read their reports. In April, 1920, Mrs. Buckley fell seriously ill and matters were suspended for some time. At the beginning of September, 1920, Mr. Abrahams saw Mrs. Buckley again, and thenceforward interviews were frequent. Many inquiries were made. The inquiry agents were instructed to resume their work. Their further reports are before me. They contain evidence which I need not specify. Counsel was then instructed to prepare a petition for divorce against Mr. Buckley. He did so. I have read the draft. It contains definite charges of adultery on several dates and a number of allegations of cruelty against the husband. I abstain from indicating the details of those allegations.

The husband learnt that divorce proceedings were contemplated. Negotiations ensued between the plaintiffs, on behalf of Mrs. Buckley, and a well-known firm of solicitors on behalf of Mr. Buckley for a deed of separation, whereby the publicity of a divorce petition might be avoided. I need not describe the course of negotiations. A draft agreement was signed by both husband and wife in November, 1920, subject to the preparation by the respective solicitors of a formal deed. That formal deed has never been signed owing to disputes on detail. The husband, however, paid various instalments of the separation allowance. The parties are still apart.

Litigation is proceeding between them which does not touch this case.

Such are the broad facts. The plaintiffs' bill of costs is in respect of the matters I have outlined. I need add a few matters only.

At the time when Mrs. Buckley first called on the plaintiffs she was nominally living with her husband. She had not then left him. But husband and wife were on terms of enmity. Mrs. Buckley has no property of her own. Her husband, however, allowed her to receive the income of a certain marriage settlement fund. It amounted to about 340*l.* a year. Out of this, however, she had to maintain and educate the child of the marriage, and she had also, as a moral obligation, to support certain near relatives. Her husband was supposed to have an income of some thousands a year. He lived beyond it. He was pressed for debt. His wife had sold many of her jewels to meet her husband's obligations. She received no fixed or, indeed, any allowance for dress and the like. Her monetary position when she asked the advice of the plaintiffs was critical. I need say no more about her financial state. I am satisfied that the plaintiffs looked to the husband and not to the wife for their costs in spite of the fact that by the help of friends or otherwise she paid them two sums of 20*l.* and 30*l.* on account.

At the trial before me the wife stated on oath that her allegations against her husband were true. He denied them. He disputed the alleged adultery. Neither side proffered me the full testimony which would be necessary ere I could finally decide whether in fact the defendant was guilty of adultery, and as to the cruelty the evidence was given in the broadest way. I do not expressly determine the questions of adultery or cruelty. Neither side asked me to do so. I am, however, fully satisfied, firstly, that ample ground existed for asking the Divorce Court to determine whether the charges against the husband of adultery and cruelty were well founded; secondly, that the plaintiffs acted with full care, proper diligence and adequate inquiry. They acted on reasonable grounds. They were justified in accepting the statements of

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the wife as a basis for the course they took. She did not act, I am satisfied, from mere irritability or passing anger or a distorted mind. The plaintiffs, I hold, had reasonable ground for believing and did believe that the wife was entitled to seek a decree in the Divorce Court. I observed with closeness both the husband and wife when in the witness box. So far as they disagree, I prefer the evidence of the wife.

Upon the circumstances as I have stated them can the plaintiffs recover against the husband? Mr. Hilbery, counsel for the husband, submitted strongly that the plaintiffs must fail. Mr. Giveen for the plaintiffs contended, with equal vigour, that the plaintiffs were entitled to succeed. I need not formulate their able arguments. It is curious that the points at issue should be in doubt at the present day. I have considered the decisions cited by counsel. I have read other decisions. I am bound to say that the authorities seem to be in a state of some confusion. There are cases which appear to be adverse to the plaintiffs. I mention one case at once. It is *Taylor* v. *Hailstone*. (1) There the plaintiff solicitor, who had acted for the wife in certain proceedings for a judicial separation, failed in his claim for costs against the husband. The suit for judicial separation never came to trial. It was compromised. Mathew J. said in his judgment (2): "Unless the necessity for the proceedings is made out in point of fact, the husband cannot be made liable." By this I understand the learned judge to rule that unless the wife's allegation be shown to be true, to the satisfaction of the Court, the solicitor cannot recover. I feel, however, that the words I have just quoted may be regarded as obiter dicta only, for I observe that the learned judge later found that the plaintiff solicitor had no reasonable ground for believing that the defendant's wife was entitled to a judicial separation.

There is another case which I should also mention at once. It is *In re Hooper* (3) There Turner L.J. apparently expressed a view (4) like to that stated by Mathew J. in *Taylor* v.

(1) 52 L. J. (Q. B.) 101.
(2) Ibid. 102.
(3) 2 D. J. & S. 91.
(4) Ibid. 99, 100.

Hailstone (1), though Knight Bruce L.J. abstained from an opinion on the point. The words of Turner L.J. were, however, again obiter dicta only, for the Court found as a fact that the wife had been frivolous in her assertions, and that the solicitors had failed in proper care and inquiry and had no reasonable ground for accepting the assertions of the wife.

If the dicta I have cited from the two cases mentioned are correct, it would seem that the plaintiffs here must fail, but I cannot avoid the observation that several relevant decisions were not cited to Mathew J. in *Taylor* v. *Hailstone* (1) and that several authorities were not before the Court in *In re Hooper*. (2)

Half the bulk and much of the confusion of English case law springs from the fact that many decisions are given without adequate reference to the particular authorities which bear on the point at issue. If those authorities are before the Court then a decision, be it right or wrong, is, at all events, given with knowledge of the appropriate cases. If not before the Court, then obscurity and inconsistency take a new birth.

I venture now to mention the decisions as briefly as possible, and to deal with the origin and illustrations of the rules which, in my view, govern a husband's liability for the legal costs incurred by his wife in such circumstances as the present.

It must be remembered that the right of the wife to commence matrimonial proceedings against the husband is co-existent with her right to defend such proceedings if brought by the husband against her. This being so, let me at once refer to *Robertson* v. *Robertson* (3) heard before Jessel M.R., Brett and Cotton L.JJ. There the wife's solicitors recovered against the husband the costs incurred in defending the wife, although she had been found guilty of adultery and a decree nisi had been made against her. Jessel M.R. said (4): "Now on principle it is plain that the

(1) 52 L. J. (Q. B.) 101.
(2) 2 D. J. & S. 91.
(3) (1881) 6 P. D. 119.
(4) Ibid. 122.

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whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony pendente lite so as to provide for her maintenance. Of course the husband may say 'It is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty.' No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him a sum of 10,000*l.*, or 20,000*l.*, or 50,000*l.*, would not she have a right to say 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into court, and finally by payment of the proper costs incurred when the suit was heard."

These words of Sir George Jessel give, I think, the basic explanation of an apparent anomaly. They were approved by the Court of Appeal in *Kemp-Welch* v. *Kemp-Welch*. (1) The comment is sometimes, and may be, made by some that *Robertson* v. *Robertson* (2) indicates only the practice of the former Ecclesiastical Divorce Courts. But the answer to this is that the Ecclesiastical Courts acted, to a wide extent, on a principle akin to the somewhat narrower principle of the common law. That common law principle imposes liability on a husband, under special circumstances, for necessaries supplied to the wife. Many authorities on this point are

(1) [1910] P. 233, 236. (2) (1881) 6 P. D. 119.

given in Leake on Contracts, 7th ed. pp. 420 et seq. I do not here propose to touch on the question of necessaries at common law, save in so far as it bears on the questions in this action.

The earliest common law case to which I call attention is *Shepherd* v. *Mackoul.* (1) There the wife had been violently turned out of doors by the husband. She exhibited articles of the peace against him. It was held that the wife's attorney could recover his reasonable costs against the husband. Lord Ellenborough said (2): "If she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband for the necessary expense of this proceeding as much as for necessary food or raiment." Those words seem to be just. A married woman should have a fair chance of protecting her welfare. The principle stated by Lord Ellenborough has been strikingly applied in many later cases. Protection of the wife, however, and not the punishment of the husband, is the important matter. Hence in *Grindell* v. *Godmond* (3) it was held that the costs of indicting the husband for assault could not be recovered: see per Lord Campbell in *Brown* v. *Ackroyd.* (4)

In *Turner* v. *Rookes* (5) it was again held that the wife's solicitor could recover the costs of exhibiting articles of the peace against the husband who had used violence. It was so held in spite of the fact that the wife and husband had been separated for seven years, she living upon a maintenance of 112*l.* per annum secured to her by deed by the husband. As Denman C.J. said during the argument (6): "I do not see that the separate maintenance has anything to do with the question. She has that for other purposes: this cannot have been contemplated in making the allowance."

It is to be noticed that in the three cases I have cited of

(1) (1813) 3 Camp. 326.
(2) 3 Camp. 326, 327.
(3) (1836) 5 Ad. & E. 755.
(4) (1856) 5 E. & B. 819, 826.
(5) (1839) 10 Ad. & E. 47.
(6) Ibid. 48.

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Shepherd v. *Mackoul* (1); *Grindell* v. *Godmond* (2); and *Turner* v. *Rookes* (3), the wife had in fact proved the wrongful conduct of her husband. It will be seen, however, that this question of actual and conclusive proof of misconduct ceases, as appears from the cases I shall mention, to be deemed an essential element for a cause of action by the wife's solicitor against the husband for costs.

In *Rice* v. *Shepherd* (4) the solicitor sued for costs upon a retainer by the defendant's wife on a petition filed by her in the Divorce Court for a judicial separation on the ground of cruelty and adultery, in which the proceedings had been stayed. At the trial before Willes J. the plaintiff got his judgment. Mr. Denman Q.C. moved the Court to enter judgment for the defendant, but on it appearing that the petition alleged acts which, if proved, would make out a case of cruelty against the husband, the Court, consisting of Erle C.J., Willes J. and other judges not named in the report, refused the motion. The case is important. No proof appears to have been given of actual cruelty or adultery. Erle C.J. said (4): "No doubt such costs come under the description of a 'necessary.' The wife pledges her husband's credit at the beginning of the suit: and I see nothing in the practice of the Divorce Court to take away the wife's common law right." Willes J. said (4): "As to the mode of making the husband pay in the Divorce Court, that is only one of the numerous methods of giving a remedy. The action at common law is not taken away."

Now *Rice* v. *Shepherd* (4) followed, I think, in substance the principle of the somewhat earlier case of *Brown* v. *Ackroyd* (5), where the wife had presented a suit for separation on the ground of alleged cruelty. She died before the suit was heard. Lord Campbell said (6): "The rule, therefore, is that the proctor must shew that there was reasonable cause for instituting the proceeding; if more were required, it would be merely illusory to say that the wife had the power to

(1) 3 Camp. 326.
(2) 5 Ad. & E. 755.
(3) 10 Ad. & E. 47.
(4) (1862) 12 C. B. (N. S.) 332, 333.
(5) E. & B. 819, 826.
(6) Ibid. 819, 827.

pledge the husband's credit." The Court, however, held on the facts that there was no reasonable cause, and hence the claim of the solicitors failed.

The case of *Wilson* v. *Ford* (1) next calls for mention. There the husband had actually deserted his wife. She consulted solicitors. They commenced a suit for restitution of conjugal rights. Ere it could be heard the husband died, and so no decree was pronounced. It was held that the wife's solicitors could recover the costs against the husband's executors, although, as Channell B. said (2): "What would have been the termination of the suit, we cannot tell." The solicitors, I point out, recovered: (1.) the preliminary and incidental costs of the suit for restitution, (2.) costs of obtaining counsel's opinion on an ante-nuptial settlement, and (3.) costs for professional advice as to dealing with tradesmen and as to preventing a distress on furniture of the husband in the house the wife occupied.

In *Ottaway* v. *Hamilton* (3) the wife actually obtained a decree against the husband for adultery and cruelty. The costs as between party and party had been taxed and paid. The wife's solicitor then sued the husband for what I may call solicitor and client costs. Those costs fell under four main heads—namely, (1.) costs of taking counsel's opinion and of correspondence with the wife; (2.) costs arising out of a proposal for the compromise of the divorce suit; (3.) payments made to detectives and others in obtaining information relating to the acts of adultery alleged to have been committed by the defendant in divers places; (4.) certain other costs. Both Denman J. and the Court of Appeal held that the plaintiff could recover under each one of the heads I have mentioned. The ratio seems reasonably clear from the judgments—namely, that the costs were "necessaries" and that the divorce practice did not affect common law rights. It seems to me to be clear also that the test adopted was whether the suit had been reasonably instituted. This, and not the success of the suit, is the test, I think, for as Bramwell L.J. pointed

(1) (1868) L. R. 3 Ex. 63. (2) L. R. 3 Ex. 63, 67.
(3) (1878) 3 C. P. D. 393.

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out (1), the husband might die before decree pronounced. Thesiger L.J. said (2): "I agree with the other members of this Court that the items claimed seem to have been properly charged against the defendant in respect of a suit, which is proved by the result to have been reasonably instituted." In the somewhat earlier case of *Stocken* v. *Pattrick* (3) the wife complained of her husband's cruelty and adultery and consulted her solicitors. They made due inquiries and, having satisfied themselves that there were good grounds for instituting divorce proceedings, filed a petition for dissolution of marriage. Before the hearing, however, the husband and wife came to an arrangement, and a deed of separation was executed, whereby the husband secured the wife a yearly sum. An action by the solicitors against the husband for the costs incurred by the wife from the time she consulted them onwards was held good. Kelly C.B. said (3): "The wife has just as much right by means of an attorney to institute a suit for divorce or judicial separation upon the ground of adultery and cruelty, as she has to go into debt and prevail on anybody to give her food and raiment if her husband has deserted her, and left her without the means of support." It is to be noted that in *Stocken* v. *Pattrick* (3) the jury found that the husband had in fact been guilty of cruelty, but it is also to be added that they had found that the divorce proceedings were not needed in order to procure the deed of separation. The latter finding, however, was regarded by the Court as immaterial. It was further ruled by the Court that the fact that the wife had a separate and sufficient sum for maintenance was no defence to the action.

The test cannot therefore be, I think, whether the wife be finally successful or not. In *Robertson* v. *Robertson* Jessel M.R. said (4): "Now, as was observed by the learned Judge in the case of *Flower* v. *Flower* (5), it is not the solicitor's fault if the wife is wrong. If he himself conducts the litigation properly, if he fairly investigates the charges and sees a

(1) 3 C. P. D. 399.
(2) Ibid. 403.
(3) (1873) 29 L. T. 507, 508.
(4) 6 P. D. 119, 122.
(5) (1873) L. R. 3 P. & M. 132.

reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful." I agree that Jessel M.R. was there speaking of defence. But Cotton L.J. said (1): "When the wife has to take proceedings against her husband, or he against her—all her property being in him—she ought to be provided at his expense with the means of bringing her case before the Court . . . . and whether she is successful or not, in my opinion the rule is to this effect, that the costs properly incurred in bringing her suit before the Court, or in defending the attack made on her, ought to be paid by her husband." Such are the words of Cotton L.J.; and I may here venture to refer to my own judgment in the divorce case of *Franklin* v. *Franklin* (2) as to the duty of a solicitor with respect to the defence of a wife charged with adultery: see also *Otway* v. *Otway*. (3) I may mention that in *Ex parte Moore* (4) the wife's proctor was allowed to prove, in the husband's bankruptcy, for the wife's costs of defending a suit for divorce which, owing to the insolvency of the husband, had been discontinued. But the question of defence may well raise other considerations.

I should point out here that in *Cale* v. *James* (5) a Divisional Court decided on the wording of the statute that the rules indicated in the cases I have cited do not apply to applications made under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). I need not here analyse that decision or indicate the reasons for doubting its correctness as to the effect of the Act of 1895. I ought to point out also that in *Cobbett* v. *Wood* (6) the Court of Appeal stated it to be an open question whether the wife's solicitors could sue the husband for the wife's costs where the petition for judicial separation had been actually heard and dismissed. The relevant decisions do not seem to have been before the Court. It should be remembered that a vital witness may die the day before the hearing. In the case now before me, however,

(1) 6 P. D. 125.
(2) [1921] P. 407, 415.
(3) (1888) 13 P. D. 141.
(4) (1845) De G. 173.
(5) [1897] 1 Q. B. 418.
(6) [1908] 2 K. B. 420.

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the points at issue in *Cale* v. *James* (1) and *Cobbett* v. *Wood* (2) do not arise at all.

I now summarize my conclusions upon the law applicable to the case, where, as here, the wife commences the matrimonial proceedings or their preliminaries.

First : I am of opinion, with all respect to those distinguished judges, that the dictum of Mathew J. in *Taylor* v. *Hailstone* (3) and the dictum of Turner L.J. in *In re Hooper* (4) are erroneous and opposed to the body of authority. It is not, in my view, necessary for the plaintiffs here to prove that the defendant was in fact guilty of cruelty or in fact committed adultery.

Secondly : It follows, therefore, that it is not essential, in a case like the present, to show that the wife had actually procured a decree in her favour.

Thirdly : It is, however, essential in such a case as that now before me, for the solicitor to clearly prove that he acted on reasonable grounds, that he made adequate inquiries and that he showed proper diligence and full care. Those are the rules which I propose to apply here. I may add that the old case of *Ladd* v. *Lynn* (5), in which Parke B. apparently said that a deed of separation could not be called a necessary for a wife, must now be deemed inconsistent with later authorities.

A further point argued before me—namely, that if the wife here was held to have separate estate, it follows that the plaintiffs' action must fail. Undoubtedly in former days the fact that a wife possessed separate estate or a separate maintenance was held not to affect the solicitors' right to costs against a husband : see, for example, *Turner* v. *Rookes* (6) and *Stocken* v. *Pattrick*. (7) In Halsbury's Laws of England, vol. xvi., p. 429, it is assumed that the old rule still prevails. This may very well be so : see Lush on Husband and Wife, 3rd ed. pp. 427, 428, for a legal rule may often survive the reason for its existence, and married men nowadays may have to suffer more hardships than married women. But in cases

(1) 1 Q. B. 418.
(2) 2 K. B. 420.
(3) 52 L. J. (Q. B.) 101, 102.
(4) 2 D. J. & S. 91, 99-100.
(5) (1837) 2 M. & W. 265, 267.
(6) 10 Ad. & E. 47.
(7) 29 L. T. 507.

where the wife has substantial means, or where there are special circumstances, it may be that the effect of the Married Women's Property Acts will some day have to be considered: see Lush on Husband and Wife, 3rd. ed., pp. 432, 433.

I do not decide here the point of law, for I am satisfied on the facts that the wife had no independent separate estate at all. She had not (as I have already said) even a fixed allowance, and the income her husband permitted her to receive from a marriage settlement fund was consumed by her family obligations.

For the reasons given I hold that the plaintiffs, upon the rules of law I have ventured to state, are entitled to recover on the facts I have mentioned earlier. There is, however, a further point I briefly mention. The plaintiffs alleged that the defendant, in the autumn of 1920, had definitely agreed by word of mouth with the plaintiffs in the presence of the wife, to pay the wife's costs. I have weighed the evidence, and I need only say that I accept the testimony of Mr. Abrahams and the wife against the defendant's evidence. I need not decide the question whether this promise was confirmed later. The two professional gentlemen concerned differed in their recollection on the point.

Since writing this judgment I have this morning seen a brief note of the case of *Durnford* v. *Baker* (1), tried before Rowlatt J. on March 12 last. I greatly hope that the views I have just ventured to express do not conflict with those of my learned and experienced colleague. In *Durnford* v. *Baker* (1) the solicitor failed on the ground that the wife, who had started a divorce suit, was discovered to have herself committed adultery, whereupon the petition was not proceeded with, but was dismissed ultimately for want of prosecution. But even so it may well be, with all respect, that the right of a solicitor in such a case may call for further consideration in the light of many decisions in the Divorce Court as well as of common law principles and cases. In the action now before me there is no suggestion of misconduct against Mrs. Buckley.

In giving judgment for the plaintiffs I desire to say that in

(1) [1924] W. N. 110. Not yet reported.

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view of the possibilities which exist that a wife may sometimes seek to impose burdens of costs on her husband, either by frivolous charges, or imaginary grievances, or by the indulgence of mere resentment, it seems to me essential that cases like the present should be closely scrutinized and that no judgment should be given in a plaintiff's favour unless he proves (inter alia) a full compliance with the third rule I have stated. I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiff: *Michael Abrahams, Sons & Co.*
Solicitors for defendant: *Valpy, Peckham and Chaplin.*

W. L. L. B.

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March 12, 13.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* PARR AND OTHERS.

Revenue—Estate Duty—Aggregation of Estates—Tenant for Life under Will—Disentailing Deed and Resettlement—New Life Estate in Restoration and by way of Confirmation of Life Estate under Will—Property passing on Death of Tenant for Life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 4—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 12, *sub-s.* 2—*Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16.

Under the will of a testator, who died in 1870, real estate was devised to the use of A. for life and after his death to the use of his sons successively in tail male. On November 4, 1895, A. and his son B., then tenant in tail, concurred in executing a disentailing assurance conveying the property to a grantee to hold to such uses as A. and B. should jointly appoint. By a resettlement dated December 19, 1895, the property was appointed and conveyed to such uses as A. and B. should jointly appoint and in default of appointment to the use of A. for life by way of restoration and confirmation of his life estate under the testator's will, and subject thereto to the use of B. for life with remainder to the use of his sons successively in tail male. A. died in 1920 possessed in his own right of real and personal estate. The Crown claimed that on A.'s death his own estate and the settled property fell to be aggregated under s. 4 of the Finance Act, 1894, so as to form one estate for the purposes of estate duty. The defendants contended that the settled property passed on the death of A. not under the resettlement but under the will of the testator who died before August 1, 1894, and that by virtue of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907,

the settled property did not fall to be aggregated with A.'s own estate, but was liable to estate duty as an estate by itself:—

Held, by Pollock M.R. and Atkin L.J., Sargant L.J. dissenting, that the two estates fell to be aggregated, as the settled property passed on A.'s death not under the testator's will but under the resettlement.

In re Constable's Settled Estates [1919] 1 Ch. 178 applied.

Decision of Rowlatt J. [1923] 2 K. B. 456 affirmed.

APPEAL from the decision of Rowlatt J. (1) upon an information on behalf of the Crown.

Thomas Parr (hereinafter called "the testator") by his will dated July 1, 1869, devised his Grappenhall and Appleton estate, in the county of Chester, to the use of his son Joseph Charlton Parr for life with remainder to the use of his sons successively in tail male with remainders over. The will also gave Joseph Charlton Parr powers of jointuring and of raising portions for his children.

The testator devised his residuary real estate to the use of his trustees upon trust, subject to a term, for his son Thomas Philip Parr for his life with remainder to the use of his sons successively in tail male and in default of such issue in trust for the said Joseph Charlton Parr for his life with remainder to his sons successively in tail male. The testator empowered every tenant for life to appoint to his wife a yearly rentcharge not exceeding 1500*l.*

The testator died on January 6, 1870, without having revoked or (so far as material) altered his will.

By his marriage settlement dated February 5, 1872, Joseph Charlton Parr charged the Grappenhall and Appleton estate with a jointure of 600*l.* in favour of his wife Jessie Maria Parr, and by the same indenture he charged the same estate with portions for the younger children of the marriage.

There was issue of the marriage of Joseph Charlton Parr and Jessie Maria Parr, the defendant Roger Charlton Parr, born on November 3, 1874, and three daughters.

Upon the death of Thomas Philip Parr on October 29, 1891, without issue but leaving a widow, Agnes Darby Parr, to whom he appointed a jointure of 1500*l.*, Joseph Charlton Parr became tenant for life of the testator's residuary real

(1) [1923] 2 K. B. 456.

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estate subject to the rentcharge in favour of Agnes Darby Parr, and also of the testator's residuary personal estate subject to certain legacies, and subject thereto and to Jessie Maria Parr's jointure and the portions for the younger children of Joseph Charlton Parr, the defendant Roger Charlton Parr became tenant in tail male of the testator's residuary real and personal estate.

By an indenture (hereinafter called "the disentailing deed") dated November 4, 1895, and duly enrolled, Joseph Charlton Parr and Roger Charlton Parr, with the consent of Joseph Charlton Parr as protector of the settlement, conveyed to Alan Lister Kaye and his heirs all the hereditaments devised by the testator's will and also (by way of conveyance and not of exception) all the other hereditaments which had by purchase or otherwise become subject to the subsisting uses or trusts of the testator's will or of which Roger Charlton Parr then was tenant in tail male or in tail at law or in equity, and also all the moneys, stocks, etc., which then were or might be or become liable to be invested in the purchase of hereditaments to be settled to such of the uses declared by the will concerning the testator's residuary real estate or the Grappenhall and Appleton estate, to hold all the said premises unto the said Alan Lister Kaye and his heirs (subject to the said jointures and portions), but freed and discharged from all estates in tail male or in tail of Roger Charlton Parr and all estates, etc., to take effect after the determination or defeasance of such estate in tail male or in tail or any of them to such uses as Joseph Charlton Parr and Roger Charlton Parr should jointly appoint.

By an indenture (hereinafter called "the resettlement") dated December 19, 1895, made between Joseph Charlton Parr of the first part, Roger Charlton Parr of the second part, and Henry Bingham Parr and Alan Lister Kaye of the third part, after reciting (inter alia) that Joseph Charlton Parr and Roger Charlton Parr had agreed to make the settlement thereinafter contained, it was witnessed that Joseph Charlton Parr and Roger Charlton Parr in exercise of the

power given to them by the disentailing deed as settlors jointly appointed the various properties described in the schedules thereto (except those parts of the hereditaments which had been purchased by Joseph Charlton Parr since the testator's death) subject to the aforesaid jointures and portions, to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared and contained and it was by the resettlement also witnessed that in pursuance of the said agreement Joseph Charlton Parr as settlor granted and conveyed to the said Henry Bingham Parr and Alan Lister Kaye and their heirs all and singular the hereditaments known as the Staunton Park estate of which he was seised in fee simple and also the hereditaments purchased by him, Joseph Charlton Parr, since the testator's death and of which he was seised in fee simple to hold all the said premises to the said Henry Bingham Parr and Alan Lister Kaye and their heirs to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared.

By the resettlement it was agreed and declared that the Staunton Park estate should (subject to certain mortgages) remain and be to such uses upon such trusts and with and subject to such powers and provisions as Joseph Charlton Parr should by deed or will appoint and that all the premises thereinbefore appointed should (subject as to such of them as were subject to the said jointure rentcharges and portions) thenceforth remain and be to such uses upon such trusts and with and subject to such powers and provisions as Joseph Charlton Parr and Roger Charlton Parr should jointly appoint and that in default of appointment all the said premises thereinbefore appointed granted and conveyed (including the Staunton Park estate) should remain and be to the use that Roger Charlton Parr should receive thereout during the joint lives of himself and Joseph Charlton Parr a certain rentcharge and subject thereto to the use of Joseph Charlton Parr for his life without impeachment of waste by way of restoration and confirmation of his then present life estate under the testator's will together with all the then existing

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powers under the will of jointuring any aftertaken wife and all his then existing powers of charging portions for his younger children so far as the same had not been already exercised and all powers of leasing and sale annexed to or exercisable during the continuance of such life estate under or by virtue of the testator's will or the Settled Land Acts or otherwise and which immediately before the execution of the disentailing deed were capable of being exercised, with remainder to the use that the said Jessie Maria Parr should receive during her life, if she survived Joseph Charlton Parr, a rentcharge of 1000*l.* a year (in addition to that created by the marriage settlement) and subject thereto to such uses as Roger Charlton Parr should by deed or will appoint and in default of appointment to the use of Roger Charlton Parr for his life with remainder to his sons successively in tail male with remainders over.

The information alleged that the joint effect of the disentailing deed and the resettlement was (1.) to destroy and extinguish the life estate of Joseph Charlton Parr and all estates in remainder thereon which before the execution of these instruments subsisted by virtue of the testator's will, and (2.) to create an entirely new life interest in Joseph Charlton Parr in the Grappenhall and Appleton estate and the residuary real and personal estate of the testator with remainders over as in the resettlement expressed.

Joseph Charlton Parr died on February 27, 1920, and the information alleged that under and by virtue of the resettlement the property appointed by or comprised therein (except certain parts thereof which had been conveyed to Roger Charlton Parr by appointments made in 1897, 1898, 1901 and 1906 as supplemental to the resettlement) passed upon his death subject to the jointure rentcharges and portions.

Joseph Charlton Parr died seised or possessed in his own right of real and personal estate of great value. This real and personal estate is hereinafter called "the free estate."

The information alleged that upon the death of Joseph Charlton Parr estate duty became payable in respect of the free estate and the settled property, and that by virtue of

s. 4 of the Finance Act, 1894, the free estate and settled property were, for determining the rate of estate duty, to be aggregated so as to form one estate, and the information prayed for a declaration to that effect.

By their answer the defendants contended that the settled property passed on the death of Joseph Charlton Parr not under the resettlement but under the will of the testator who died before August 1, 1894, and that by virtue of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the settled property did not fall to be aggregated with the free estate but was liable to estate duty as an estate by itself.

Rowlatt J. held that having regard to the decision of the Court of Appeal in *In re Constable's Settled Estates* (1) the property in question passed on the death of Joseph Charlton Parr, not under the will but under the resettlement, and therefore it was liable to aggregation for the purpose of estate duty under s. 4 of the Finance Act, 1894.

The defendants appealed. The appeal was heard on March 12, 1924.

Maugham K.C. and *Spens* for the appellants. This case is not concluded by the decision in *In re Constable's Settled Estates.* (1) The question there was whether under the Settled Land Act Col. Constable was tenant for life under the resettlement so as to be able to exercise the extended powers under it. The decision does not affect the question in this case whether the beneficial interest of Joseph Charlton Parr was in any way altered by the disentailing deed and the resettlement. He has all along been entitled to the whole beneficial life interest and has never dealt with it in any way. The root of his title remains the same. It is based on and derived from the will of Thomas Parr and not from the subsequent resettlement. It is the substance of the matter which has to be considered and not the artificial conveyancing procedure which was necessary in dealing with the family estate. The following succession duty cases throw some

(1) [1919] 1 Ch. 178.

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light upon the question, because the House of Lords there decided that the resettlement did not determine who the predecessor was: *Lord Braybrooke* v. *Attorney-General* (1); *Attorney-General* v. *Floyer* (2); and *Attorney-General* v. *Smythe.* (3) *Lord Lilford* v. *Attorney-General* (4) shows how little the form is regarded when the substance remains the same. See also *Duke of Northumberland* v. *Attorney-General.* (5) A disentailing deed does not change the identity of the estate with which the parties are dealing. It is submitted that in substance the settled estate passed under the will of the testator, and not under the resettlement. J. C. Parr, after the execution of the disentailing deed and the resettlement, for all practical purposes enjoyed the same beneficial life estate as he had before.

[They also referred to *Attorney-General* v. *Earl Londesborough* (6); *In re Meeking* (7); *In re Mundy & Roper's Contract* (8) and Williams on Vendor and Purchaser, 3rd ed., vol. i., 296.]

Sir P. Hastings A.-G. and *Gavin Simonds* for the Crown. The case is governed by *In re Constable's Settled Estates.* (9) J. C. Parr clearly held his life estate under the resettlement. The disposition under the will was swept away by the resettlement and fresh estates created thereby.

The appellants rely upon s. 12, sub-s. 2, of the Finance Act, 1900. (10) The Crown, on the other hand, rely upon s. 4 of the Finance Act, 1894. (10)

(1) (1861) 9 H. L. C. 150.
(2) (1862) 9 H. L. C. 477.
(3) (1862) 9 H. L. C. 497.
(4) (1867) L. R. 2 H. L. 63.
(5) [1905] A. C. 406.
(6) [1905] 1 K. B. 98.
(7) [1922] 2 Ch. 523.
(8) [1899] 1 Ch. 275.
(9) [1919] 1 Ch. 178.
(10) Finance Act, 1900, s. 12, sub-s. 2: "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894 [August 1, 1894], and such property would, if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

Attorney-General v. *Cecil* (6) shows that it is established that where tenant for life and tenant in tail in remainder concur in barring the entail, and creating a new estate or interest in the property, the new estate or interest so created is to be considered as derived wholly out of the interest of the tenant in tail, who is therefore the predecessor of the succession. That principle applies here. The question is, under what disposition did the property pass? It is submitted that it passed under the resettlement. It is the specific property which passes, and not the life estate.

Maugham K.C. in reply. The disentailing deed and the resettlement must be treated as one transaction. As to the life estate it was intended that that should not be affected in any way, save as to the rentcharge.

POLLOCK M.R. This is an appeal from the decision of Rowlatt J., and it raises the question whether or not the two estates, which have passed to the present tenant for life, are to be aggregated so that they are to pay estate duty at a higher rate than would be payable if they were not so aggregated.

The point is an important one and it is well at the outset to observe what is the effect of the relevant Acts that we have to consider. By the Finance Act, 1894, there was a grant of what was called estate duty in respect of persons dying after the commencement of that Act, which was to be levied and paid upon the principal value ascertained of all property real and personal, settled or not settled, which passed on the death of such person. Then by s. 2 there was a provision

Finance Act, 1907, s. 16: "In the case of persons dying on or after April 19, 1907, any settled property which would, under sub-s. 2 of s. 12 of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself."

Finance Act, 1894, s. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof. . . . ."

(1) (1870) L. R. 5 Ex. 263.

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which interpreted on a very broad basis what was the meaning of property which was deemed to pass. The words there are: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . . (*b*), property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Reading those two provisions together it is quite clear that the grant of estate duty was intended to be given upon all property real and personal, settled or not settled, and those words were to be interpreted as covering a very wide range. Sect. 4 of that Act is the charging section in this case, because it determines that all property so passing "shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof."

The question we have to determine is whether or not the property can be severed so as to reduce the amount payable, or whether it has to be aggregated for the purpose of s. 4 of the Act of 1894. That being the broad proposition, that the duty is payable on all property, in the Finance Act of 1900 there is an exemption, and that exemption is as follows: Sect. 12, sub-s. 2: "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894," and there would have been an aggregation and so on, then there shall be an exemption, which in effect means that the properties are to be dealt with separately, because that particular section I have read is modified by s. 16 of the Finance Act of 1907, the effect of the two sections being, if there is not to be aggregation, then the property, which might have been aggregated, is to be treated as an estate by itself. For the purpose of this case it is important to observe that sub-s. 2 of s. 12 of the Finance Act of 1900 deals with property which passes, or is deemed to pass, thus picking up not only the property which is referred to in s. 1, but also the property which is dealt with in s. 2 of the Finance Act,

1894. Prima facie therefore all the property pays the duty unless the subject can bring himself within the exemption which is granted by sub-s. 2 of s. 12 of the Finance Act, 1900, as modified by s. 16 of the Act of 1907.

In the present case what has happened is this. Thomas Parr made his will and died in 1870. Under his will real estate was devised to the use of his son, Joseph Charlton Parr, for life, and after his death to the use of his sons successively in tail male. While Joseph Charlton Parr was tenant for life, that is in November, 1895, Joseph Charlton Parr and his son Roger Charlton Parr concurred in executing a disentailing assurance conveying the property to a grantee or trustee to hold to such uses as Joseph Charlton Parr and Roger Charlton Parr, that is father and son, should jointly appoint. By a resettlement of December 19, 1895, the property was appointed and conveyed to such uses as Joseph Charlton Parr and Roger Charlton Parr should jointly appoint, and in default of any appointment, to Joseph Charlton Parr, for life by way of restoration and confirmation of his life estate which he had taken under Thomas Parr's will, and subject to that life interest to Roger Charlton Parr for life with remainder to the use of his sons successively in tail male. It is quite clear that for the purpose of the Finance Acts and the Estate Duty Acts, we look at these two deeds, although one was made on November 4, 1895, and the other on December 19, 1895, as all part of one transaction, which may be considered as carrying out a purpose and determination already entered into between the father and the son at the moment when the first deed was executed. What is the effect of those deeds? It is said that with regard to Joseph Charlton Parr his interest is a life interest which he had under the will of his father Thomas Parr, and with regard to Roger Charlton Parr it is said that he had his interest also as tenant in tail in remainder safeguarded to him under the will, and these deeds that were executed in 1895 were executed for a different purpose, and the real root—I am putting this matter quite broadly—of their interest in the settled land was under the will of Thomas Parr.

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The question of what was the effect of such a disentailing deed and resettlement came before this Court in the case of *In re Constable's Settled Estates* (1), and it appears from the text-books which have been cited to us on conveyancing, and particularly from the passage to which attention was called in Williams on Vendors and Purchasers, that the question that came up in *In re Constable's Settled Estates* (1) is one on which conveyancers' minds have, I will not say been divided but perhaps disconcerted for a number of years—namely, the question whether, where you have such a disentailing deed and a resettlement, the effect is that the old life estate which is restored to the person who had the life estate before, is really restored, or whether the effect, whatever is done by the deed, is that the old and same life estate is still in the possession of the person who enjoyed it before the deed was entered into, or whether it is to be treated as a new life estate, the old one having been destroyed by the disentailing deed and a new one of the same nature created by the resettlement. It is important to observe that we are not giving a decision to-day on any nice or difficult point of conveyancing, we are not concerned with whether *In re Constable's Settled Estates* (1) is correctly decided or not, it is a case which is binding upon this Court and we have to follow it. For my own part I think it would be going outside the limits and the purpose of our decision to-day if we were to discuss the difficult and important question of conveyancing whether or not *In re Constable's Settled Estates* (1) did satisfactorily conclude a matter of controversy. I quite realize the extreme importance that matters of conveyancing and conveyancing law should be both clear and easy to understand and to follow. However the Court of Appeal in that case considered the question, and Sir C. Swinfen Eady M.R. delivered the judgment of the Court. He said this (2): "How is it possible to hold that the applicant has retained a continuing life estate in the larger subject-matter, when by the terms of the resettlement he has granted and conveyed it? If the legal effect of the

(1) [1919] 1 Ch. 178. (2) [1919] 1 Ch. 193.

resettlement is to convey his old life estate, and to give him in lieu of it another life estate under that instrument (as in our opinion it is), this legal effect is not prevented by saying that the life estate under the resettlement is in restoration and by way of confirmation of his old life estate." It seems to me that those words are perfectly plain, that this Court did determine that in a case of a disentailing deed and a resettlement, following precisely the lines which have been adopted in the present case, the legal effect was to give a new life interest in the place of and in lieu of the life estate which the tenant for life had previously possessed. The Master of the Rolls points out also that as a matter of fact the words which were used, "By way of restoration," and so on, which had been introduced in order to show an intention of keeping alive the old powers, were by virtue of the Settled Land Act, 1882, s. 50, sub-s. 2, unnecessary. But it is plain to me that the Court there determined that the effect of this procedure is that in lieu of the old life estate there is a new life estate given to the life tenant; he is not the worse off, he is not the better off, but he has not got what he had before, the root of what he has being different.

Now it is said by the Crown that therefore the effect of what has happened is this, that there is here settled property which passed on the death of Joseph Charlton in respect of which duty must be paid, and that is not denied; but it is said by the appellants that the disposition under which it passed was a disposition made by a person who died before the commencement of the Finance Act, 1894—namely, a disposition by Thomas Parr in favour of his son Joseph Charlton Parr. The Crown say that the disposition under which it has passed is by virtue of what was done in 1895, when in accordance with the decision in *In re Constable's Settled Estates* (1) a new life estate in lieu of the old one was granted to Joseph Charlton Parr Mr. Maugham says that in tax cases it is important to look at the substance of the transaction, and not at the mere method by which some change is made, and he is right there. I will refer to three

(1) [1919] 1 Ch. 178.

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cases. In *Attorney-General* v. *Worrall* (1) Lord Esher M.R. says, and I think this is the best case that is usually cited for the purpose: "It has been held that in cases of this kind the Court has to determine what the real nature of the transaction was, apart from legal phraseology and the forms of conveyancing." There is another case to the same effect: *Lethbridge* v. *Attorney-General* (2), and the same principle was acted upon in *Attorney-General* v. *Earl of Sandwich.* (3) Answers Mr. Maugham: "If you look at the substance of the matter, really the root of the life interest which has passed is based upon and derived from the will of Thomas Parr and not from any subsequent settlements or artificial proceedings of the conveyancers who have been dealing with the family estate." It is important to observe what we mean when we say that the substance is to be looked at. I do not think it means that you can discard legal titles or cast aside dispositions made for prudent purposes, which may not have altered the effective beneficial interest in its result except in so far as its source is altered; you have your estate restored to you, but it is restored after it has been demolished, the source of it is not the same. You cannot by looking at the substance in the present case neglect the resettlement as totally ineffective. To look at the substance means that you may tear away any cloak devised to conceal what has been done and reveal the true nature of the transaction, but it is quite another matter to adopt such a principle for the purpose of saying that you may treat as a nullity a deed that at the relevant time is in law the root of the beneficial interest, however little it may have been necessary to change that source and root. I cannot in the present case think after what has been decided in *In re Constable's Settled Estates* (4) that we can in looking at the substance neglect the deeds of the autumn of 1895. It is quite true we can put the two together and see what has been done, but we cannot disregard them any more than any lawyer or conveyancer would disregard them and say

(1) [1895] 1 Q. B. 99, 104.
(2) [1907] A. C. 19.
(3) [1922] 2 K. B. 500.
(4) [1919] 1 Ch. 178.

they did not exist, that they were not the source from which the beneficial interest in the life estate was safeguarded to Joseph Charlton. Following out the suggestion that you are to look at the substance, Mr. Maugham calls attention particularly to *Lord Braybrooke* v. *Attorney-General*. (1) He says in that case that the Court, looking at the substance, treated the effect of what had been done so as to bring the case that had to be considered within s. 12 of the Succession Duty Act, 1853. That case I confess has given me a certain amount of difficulty, but I am satisfied that while *In re Constable's Settled Estates* (2) stands it is impossible for us to diverge from it. On the whole I have also come to the conclusion that *Lord Braybrooke* v. *Attorney-General* (1) does not govern the present case. It was decided upon different words in a different statute and upon a somewhat different point, but taking it at the full, as a case in which the substance is looked at, I find this. Lord Campbell in his judgment (3) says this: "New legal interests were taken; but are we to construe this statute with the strictness of the old law, according to which, if a testator, after making his will, suffered a recovery to give effect to the will, the will was thereby revoked, the testator, by the recovery, being no longer seised of the estate he had devised?" I am not quite certain what that means and how far Lord Campbell meant to go, but he indicates that under the devise, if followed out in that case, new legal interests were taken. If that is the case, as I think it is, we then have to apply the case to s. 12, sub-s. 2, of the Finance Act, 1900, and to consider the question whether this new life estate which was created by the resettlement passed under a disposition which had been made by a person who died before the commencement of Part I. of the Act of 1894. It is a very dangerous doctrine, as the Attorney-General points out, that we should discard the actual documents and endeavour to make up our mind what in common parlance might be said to have passed or happened. It seems to me we have closely to examine sub-s. 2, and

(1) 9 H. L. C. 150. (2) [1919] 1 Ch. 178.
(3) 9 H. L. C. 166.

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unless Mr. Maugham, representing the subject, can show that that is applicable to the particular case, we have to follow the broad rule that the property, having passed and an interest having passed to a successor, it is subject to the tax and cannot be exempted from it by our taking or somebody else taking a particular view in popular language as to what has happened. It seems to me that legally the life estate of Joseph Charlton Parr was created, and was validly created under the resettlement, that that made a different root to his life estate, a root different from what he had taken under the will which became effective in 1870, and therefore that sub-s. 2 of s. 12 does not apply. For these reasons I think that the appeal must be dismissed with costs.

ATKIN L.J. I agree. I do not think it is necessary to recapitulate the facts of the case, but it is sufficient I think to say that the argument for the appellants here was based upon this, that the settled property in this case passed on the death of the father under a disposition made by the original testator, and it was said that that was established by the fact that the life estate, which was given by the resettlement, was either in fact or at any rate in substance the same life estate as was in the father before the disentailing deed and before the resettlement, and it was conceded that if that was not the case, then the appellant was not entitled to say that the property passed under the disposition made by the testator.

That proposition of the appellants appears to me to be decided against them by *In re Constable's Settled Estates* (1), which bound the learned judge below and is binding upon us. It appears to be quite clearly decided in the passages that have been read by the Master of the Rolls, and indeed in the whole reasoning of the judgment of the Court of Appeal which was pronounced by the then Master of the Rolls, Sir Charles Swinfen Eady, that under similar circumstances the life estate of the father given by the resettlement was in fact a new estate and not

(1) [1919] 1 Ch. 178.

the old one. The force of that case had of course to be recognized by the appellants, but it was argued that it ought to be distinguished, first of all, because it was said that inasmuch as that case turned upon a consideration of the powers given under the Settled Land Acts, a different method of construction should be adopted in reference to the question whether or not a new life interest was created under the resettlement. To my mind no difference in the method of construction ought to be adopted when the words to be construed are plain. I think the decision of the Court of Appeal makes it reasonably clear that there is no doubt as to the precise legal effect of the words in this particular conveyance. Then it is said, even if that be so, even though a new life estate is created in law, still in substance it is the same estate, and it is the substance and not the form which ought to be regarded. Whatever may be meant by those words it appears to me that if in fact, as it must be assumed after *In re Constable's Settled Estates* (1), there is a new legal estate created, and that legal estate so created does in fact give a new extended power as it does under the resettlement, and if also it is found that it is created for the purpose of putting before it an interest which otherwise did not exist—namely, a rentcharge to the son, in substance there is also a new life estate. In other words, when once conveyancers have in fact transmuted the old body into a new body, they cannot claim to have retained the old body, whatever incantations they may use in the process. Inasmuch therefore as there is here in substance a new life estate, ex concessis the appellants' case must fail, and it is unnecessary to deal with the further question which I think might arise—namely, whether under the words of the Finance Act, 1900, even if the old estate did in fact still remain, the property passed under the disposition made by the testator, or under the disposition of the deed of resettlement. If that question should arise I cannot help thinking that *Lord Braybrooke* v. *Attorney-General* (2), decided under the Succession Duty Act, might be very relevant. However it is

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unnecessary to consider that, because for the reasons I have given I think that, having regard to the authority by which we are bound, the appellants' argument fails, and this appeal should be dismissed with costs.

SARGANT L.J. By the combined effect of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, where settled property passes on the death of a person dying on or after April 19, 1907, under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, that settled property is not to be aggregated with the other property of the person so dying so as to increase the rate of duty thereon, but is to be treated as an estate by itself. The question here is whether certain estates in the county of Chester and elsewhere, which were devised by the will of a testator, Thomas Parr, and which I will refer to as the principal settled estates, fall within the conjoint operation of these two sections, and are on the recent death of Joseph Charlton Parr exempted from aggregation with the other property of the said Joseph Charlton Parr and placed in the position of an estate by itself. But for the resettlement in December, 1895, it is clear that the principal settled estates would have complied quite strictly with the requisites of s. 12 of the Act of 1900 and s. 16 of the Act of 1907. The disposition of them was under the will of a disponer the testator, Thomas Parr, who died before August 1, 1894, and they would have been subject to estate duty on his death. The question therefore is reduced to this—namely, whether the resettlement effected such a change in the life estate of Joseph Charlton Parr in the principal settled estates that they passed on his death, not under the disposition made by the testator, Thomas Parr, as disponer, but under some other and different disposition, such as that made by the tenant for life under the resettlement.

It is contended on behalf of the Crown, and Rowlatt J.

has held on the authority of *In re Constable's Settled Estates* (1), that the particular form or process adopted on the resettlement has changed the nature of the estate of Joseph Charlton Parr from being an estate under the will to being an estate under the resettlement, and accordingly that the relief from aggregation has been excluded. The decision in *In re Constable's Settled Estates* (1) was a highly technical one, and was in contradiction of the expressed intention of the parties that the tenant for life should retain his existing life estate; but it had this advantage, that it tended in favour of that freedom of sale which was the main object of the Settled Land Acts. And in any case it is binding on this Court, and completely establishes that in the present case Joseph Charlton Parr as from and after the resettlement of December, 1895, must be considered for all the purposes of the Settled Land Acts as having ceased to be the legal tenant for life under the will of the testator, and as having become the legal tenant for life under the resettlement itself, and Mr. Maugham entirely accepted that position. But the question here is somewhat different. It is whether for the purpose of Revenue Acts, which tax beneficial interests only and have regard to the substantial effect of transactions rather than their mere technical shape, the interest which Joseph Charlton Parr had in the principal settled estates was derived from the dispositions of the will of the testator, or under the resettlement.

So far as the principal settled estates were concerned the two documents constituting the resettlement of 1895 were directed not to any alteration of the beneficial life estate of Joseph Charlton Parr, but to the enlargement of the estate tail in remainder of Roger Charlton Parr into a fee simple and the subsequent settlement of the estates on him for life with remainder to his sons successively in tail male with remainders over. Except for the creation of a rentcharge in favour of Roger Charlton Parr during the joint lives of his father and himself (on which no stress was laid in the argument here or below, or in the judgment, and which in my view is

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quite immaterial) the beneficial life interest of Joseph Charlton Parr was completely unchanged throughout. There was in fact no reason at all why the resettlement should not have been carried out entirely subject to the existing life interest of Joseph Charlton Parr and without any conveyance at all of that estate. And though the form adopted was the alternative form of resettlement which included a conveyance of the existing life estate, there was an immediate regrant of this life estate to the tenant for life in express terms, "By way of restoration and confirmation of his then present life estate"—a declaration (or "incantation") which had been recognized by Lord St. Leonards and the authors of the principal precedents as unquestionably effective. And therefore, though there was what has been decided in *In re Constable's Settled Estates* (1) to be a defect in machinery, in relation at any rate to the technicalities of the Settled Land Acts, there was in substance a mere continuation of the beneficial life interest which Joseph Charlton Parr had till then been enjoying under the disposition of the will of the testator, Thomas Parr.

In these circumstances it seems to me that the present case falls completely within the reasoning of the decisions of the House of Lords in the three important decisions in *Lord Braybrooke* v. *Attorney-General* (2); *Attorney-General* v. *Floyer* (3); and *Attorney-General* v. *Smythe.* (4) Those were cases with reference to succession duty and in which the estates to be considered were not life estates, but estates of inheritance in remainder. But this makes no difference in the applicability of the reasoning. The judgments of the majority of the House in the first of these cases, which governed the other two, were founded on the view that all the documents constituting the resettlement were to be treated as forming one transaction, and that the substance of the transaction was to be considered rather than the minute technicalities. The principle is put by the Lord Chancellor, Lord Campbell, in the following interrogative sentence (5): "Now, my Lords,

(1) [1919] 1 Ch. 178. (2) 9 H. L. C. 150. (3) 9 H. L. C. 477.
(4) 9 H. L. C. 497. (5) 9 H. L. C. 165.

did not the appellant take the Audley End estates, in popular language, and substantially, under a disposition made by himself ? " If this principle is applied here, the result must in my judgment be to regard the resettlement as not having effected any material alteration in the dispositions of the will of Thomas Parr, under which Joseph Charlton Parr took a life estate, and on his death the property passed elsewhere. The case seems to me to stand on very much the same footing as if the principal settled estates now in question had been acquired in exchange for other lands settled by the will of the testator, or represented, after a process of partition, undivided shares in lands so settled. Both there and here the governing instrument determining the beneficial interest of the tenant for life and creating the passing on his death is the will and not the resettlement. In my judgment, and with great respect to the learned judge, I think he has dealt with the matter here rather on the lines adopted by Lord Wensleydale in his dissenting judgment than on those laid down by the majority of the House of Lords.

It has been suggested that in the sections now in question of the Acts of 1900 and 1907 the language used is rather technical than popular language, and cannot therefore be interpreted so broadly as the language of the Succession Duty Act. But I do not think this suggestion is sound. Disposition and disponer are not words of art and have not in my view any other than their ordinary meaning in the English language; and in the broad ordinary meaning of the words, looking at the substance rather than the mere machinery of the documents, I come to the conclusion that the life estate of Joseph Charlton Parr down to the time of his death was derived and ceased under dispositions made by the testator, Thomas Parr, as disponer.

Appeal dismissed.

Solicitors for appellants: *Balderston, Warren & Pothecary.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

G. A. S.

1924
March 31.

WILLIAMS *v.* PERRY.

Landlord and Tenant—Rent Restriction—Premises at one Time a Dwelling House let solely for business Premises—Applicability of Act—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 2, 6.

Premises which were occupied from 1914 till 1919 partly as business premises and partly as a dwelling house, were in 1919 let to the defendant solely as business premises :—

Held, that the premises were not within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Appeal from Bow County Court.

The plaintiff, the landlord, sued the defendant, the tenant, to recover the balance of rent due in respect of certain premises occupied by the defendant. The defendant counterclaimed a sum which he said represented over-payments of rent contrary to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920 and 1923.

From August, 1914, till March, 1919, the premises in question were let to one Ward, who occupied them partly as business premises and partly as a dwelling house, the premises consisting of a shop on the ground floor and living rooms above. In March, 1919, the plaintiff verbally let the premises to the defendant as business premises, the defendant stating that he wanted the shop for his business and the upper rooms as storerooms and workrooms, and that he did not want to use any part of them as a dwelling house, as he had a house of his own elsewhere. The defendant went into occupation, and shortly afterwards, in breach of his agreement, he sublet part of the premises as a dwelling house, and, at a later stage, he took his wife and son to live there also.

The standard rent of the premises in August, 1914, was 12*s.* 6*d.* per week, but in January, 1922, the rent was raised to 4*l.* per month, the plaintiff contending that as the premises were let solely as business premises they did not come within the protection of the Rent Restriction Acts.

The county court judge found as a fact that by the agreement between the plaintiff and the defendant in March,

1919, the premises were let to the defendant solely as business premises, but he held that that agreement did not take them out of the operation of the Acts as a dwelling house. He accordingly gave judgment for the defendant on the claim and for a sum of 16*l.* on the counterclaim.

The plaintiff appealed.

Frank Powell for the plaintiff. The county court judge apparently took the view that s. 12, sub-s. 6, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says that "where this Act has become applicable to any dwelling house . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies," involves that if premises are once within the Act they are always within it. This is not so. If the premises in question on becoming vacant in 1919 had been furnished by the plaintiff and let to the defendant at a rent which included payments in respect of board, attendance or use of furniture, they would clearly be outside the protection of the Act: see s. 12, sub-s. 2 (i.), of the Act of 1920. Admittedly premises can be taken out of the Act by structural alterations, and it is submitted that the same result may be attained by agreement between the parties that the premises shall be let and used solely as business premises.

A. H. Woolf for the defendant. The county court judge was right in holding that the premises in question were not taken out of the protection of the Act by the agreement between the parties. The inference to be drawn from *Phillips* v. *Barnett* (1) is that nothing short of structural alterations involving the destruction of the identity of the building can take premises out of the Act. Sect. 12, sub-s. 6, means that premises (the physical identity of which has not been destroyed) at one time a dwelling house within the Act are always a dwelling house within the Act. No argument can properly be founded by the plaintiff on the case of a

(1) [1922] 1 K. B. 222.

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house let furnished as the Act makes a special exception for such premises.

[He referred to *Woodifield* v. *Bond* (1) and *King* v. *York*. (2)]

SWIFT J. [after stating the facts continued :] There having been, at the time the premises were let to the defendant, an agreement that no one should live there, I do not think it was open to the defendant to say that the character of a dwelling house was given to the premises by reason of the fact that some one slept there after he became tenant. If such an occupation of the premises as might constitute them a dwelling house did take place this was by the wrongful act of the defendant in breach of his bargain with the plaintiff, and I think therefore he should be estopped from saying that he has given the characteristic of a dwelling house to the premises. A person who, improperly and in breach of his agreement, occupies as a sleeping room a room which has been let to him as a workshop cannot be heard to say that by his own wrongful act he has converted that workshop into a dwelling house. But the point of the case does not turn so much upon that. Mr. Woolf for the defendant says that these premises having been, admittedly, from August, 1914, to March 1919, a dwelling house within the various Rent Restriction Acts, are now a dwelling house within the Acts of 1920 and 1923, and therefore the tenant cannot be made to pay a greater rent than as provided by the Acts. Mr. Woolf puts his argument into this proposition : premises at one time within the protection of the Act continue within that protection no matter what happens to them, short of a complete destruction of their identity. It is admitted on the authority of *Phillips* v. *Barnett* (3) that if the identity of the premises is so altered that they cannot be recognized as the same, the protection of the Act is gone, and no fresh protection is obtained for some other building erected on the site. But it is said that so long as the identity

(1) [1921] W. N. 309. (2) [1919] W. N. 59.
(3) [1922] 1 K. B. 222.

of the premises, physically and structurally, is not altered, they, if at one time within the protection of the Act, continue to be so. That argument was accepted by the county court judge, who held that, notwithstanding the agreement that the premises should be let to, and used by, the defendant solely as business premises, in law that agreement did not take the premises out of the protection of the Act as a dwelling house. I am unable to accept that view. I see no reason why premises at one time a dwelling house and therefore within the Act should not at another time be a warehouse or business premises and outside the protection of the Act. It is quite clear that premises may be partly a dwelling house and partly business premises, and it is also clear that premises may at one time be a dwelling house and at another time business premises. Any one who walks through Lincoln's Inn may see houses there which at one time were dwelling houses but, with no or very little structural alteration, have become business premises, where counsel and solicitors carry on their vocations—premises in which no one dreams of residing and which no one would call dwelling houses. While the premises in question were partly business premises and partly a dwelling house, as they were during Ward's tenancy, they came clearly within the Act. Under the Acts the fact that a business was carried on on premises did not prevent protection attaching to the whole of the premises, but it seems to me that s. 12, sub-s. 2, proviso (ii.) of the Act of 1920, which says that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes," shows that if the whole of the premises are used for business or professional purposes, it necessarily follows that the Act does not apply to them. Sect. 13 of the Act of 1920 was passed to protect premises of that kind, and so long as that section remained in force the defendant was protected in his occupation of the premises. The operation of s. 13 ceased on June 24, 1921, and once again there was no protection for business premises. At a date before

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business premises were protected, the defendant made a bargain by which he took the premises in question, not as a dwelling house but as business premises. Does the Act apply to them? For the defendant reliance is placed upon s. 12, sub-s. 6, of the Act of 1920, which provides that "where this Act has become applicable to any dwelling house . . . . it shall continue to apply thereto whether or not the dwelling house continues to be one to which this Act applies." The sub-section does not say that "where this Act has become applicable to any dwelling-house . . . . it shall continue to apply to a factory or other business premises into which the house has been converted," and I can see no reason why a dwelling house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration. I think therefore the county court judge was wrong in law in the conclusion he arrived at. The appeal must therefore be allowed.

ACTON J. I agree.

Appeal allowed.

Solicitors for plaintiff: *Rexworthy, Barnard & Bonser.*
Solicitors for defendant: *E. Edwards & Son.*

J. S. H.

EVERETT *v.* GRIFFITHS.

[1923. E. 304.]

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Jan. 30, 31;
Feb. 1, 4;
March 13.

Local Government — Local Authority — Member — Disqualification — Member Shareholder in Company — Company contracting with Local Authority — Member voting on giving a Contract — Member concerned in or participating in Profits of Contract — Penalties — Proper Form of Procedure — Action — Writ of quo warranto — Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 46, *sub-ss.* 1, 2, 8.

Local Government Act, 1894, s. 46, sub-s. 1, provides that: "A person shall be disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or of a board of guardians if he . . . . (*e*) is concerned in any bargain or contract entered into with the council or board, or participates in the profit of any such bargain or contract or of any work done under the authority of the council or board."

Sub-s. 2: "Provided that a person shall not be disqualified for being elected or being a member or chairman of any such council or board by reason of being interested . . . . (*c*) in any contract with the council or board as a shareholder in any joint stock company; but he shall not vote at any meeting of the council or board on any question in which such company are interested. . . . ."

Sub-s. 8: "If any person acts when disqualified, or votes when prohibited under this section, he shall for each offence be liable on summary conviction to a fine not exceeding 20*l.*"

An action was brought by an inhabitant of a parish, who was not a ratepayer, against the chairman of a board of guardians claiming a declaration that he was disqualified under s. 46, sub-s. 1 (*e*), of the Local Government Act, 1894, because being a servant of a company which had a contract to supply the guardians with milk he was concerned in or participated in the profit of the contract. It was also alleged that the defendant was disqualified under sub-s. 2 (*c*) because he had voted on the question of the giving of the contract to the company in which he was an employee, and the plaintiff further claimed to recover penalties:—

Held, that the action was not maintainable, as the proper procedure was by an information in the nature of a quo warranto. Secondly, that the penalties could not be recovered by action, as the statute provided that the penalties should be recovered in a Court of summary jurisdiction, and that remedy alone could be followed. Thirdly, that where a resolution was passed unanimously by a board every member present must be taken to have voted for the resolution, even although the votes were not expressly recorded.

ACTION tried before McCardie J.

The plaintiff claimed a declaration that the defendant was disqualified under s. 46, sub-s. 1, of the Local Government Act, 1894, from sitting as a member of the Islington

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Board of Guardians, because, being a manager of the Farmers and Cleveland Dairies Company, Ld., who held a contract with the guardians for the supply of milk, he was a person concerned in the contract; that he was further disqualified under s. 46, sub-s. 2 (*c*), of the Act of 1894, because he had sat and voted on September 14 and October 5, 1922, on the issue whether the contract should be given to his own company although he was a shareholder therein. The plaintiff also claimed an injunction to restrain the defendant from sitting as a member of the board and penalties to the amount of 40*l*.

The facts are fully set out in the judgment, but may be summarized as follows :—

The defendant had been a member of the Islington Guardians since 1913 and chairman since April, 1922. From the autumn of 1921 onwards various contracts had been entered between the guardians and the said company for the supply of milk. The defendant had been for many years in the service of that company, and in 1919 he became foreman or manager of their wheelwrights' shop at a salary of 4*l*. 10*s*. per week; he was also provided with rooms at the company's depot and with light and fuel. The company had a capital of 30,000*l*. issued in 1*l*. shares. The defendant held one 1*l*. share. The contracts by the Farmers and Cleveland Dairies, Ld., with the guardians were obtained after tender. The tenders were considered first by the Finance Committee, of which the defendant was a member but not chairman, and then by the full board. Prior to September 14, 1922, the board asked for tenders for the supply of milk from October, 1922, to March, 1923. On September 14, 1922, a meeting of the board was held with the defendant in the chair. Seven tenders were opened and laid before the board, including one from the Farmers and Cleveland Dairies Company, Ld. Some of the other tenders were lower than that of the Farmers Company. After discussion the defendant moved, and it was carried, that the consideration of the tenders be deferred and that a letter be sent to the several persons tendering asking if they wished to amend their

tenders. Amended tenders were received from all the firms with the exception of one, and on September 27 a meeting of the Finance Committee was held at which the defendant was present. It was unanimously resolved that the Farmers and Cleveland Dairies Company's tender be accepted and that a recommendation to that effect be made to the full board. On October 5, 1922, a meeting of the full board was held, the defendant being in the chair, when a resolution was moved by a member and put by the defendant, and unanimously carried, that the action of the committee be approved and that the Farmers Company's tender be accepted.

The judge found that the defendant never received any bonus from the Farmers Company or any sum for and in respect of the contracts made by that company with the guardians, and that his remuneration had not depended upon the profits or losses made by his employers on their contracts with the guardians.

The plaintiff lived in the parish of Islington, but he was not a ratepayer. He claimed to be legally interested in the matter as a common informer, as a parishioner and as being the highest unsuccessful candidate at the election for the Islington Board of Guardians held in April, 1922, and as being a prospective candidate at the next election.

The defendant by his defence denied that he voted at the meetings as alleged. He further said that the plaintiff was not legally interested in the matters mentioned in the statement of claim and that the statement of claim did not disclose any cause of action, and that the plaintiff was not entitled to the relief claimed.

The plaintiff in person.

D. N. Pritt for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 13. MCCARDIE J. read the following judgment: It is vital to maintain the purity and economy of local government, hence the importance of this action.

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The plaintiff seeks a declaration that the defendant is disqualified from acting as a member of the board of guardians for the parish of St. Mary Islington. He further asks for an injunction to restrain the defendant from continuing so to act, and finally he asks judgment for the sum of 40*l.* as penalties.

The Court of Appeal has intimated (upon an interlocutory argument) that this action should be fully heard.

The plaintiff is well known for his frequent, persistent, and fruitless litigation. In the case now before me, however, he has raised many points which touch the welfare of local government, and which call for careful attention. It will tend to clarity if I deal with each point separately. After careful consideration I have formed the view that the case is not one which should be dealt with by a preliminary decision on the novel and difficult question as to whether a common law action is the proper method of deciding the issues which arise. Those issues are serious and unusual.

It is best to set out at once the relevant statutory provisions and then to state briefly the material facts applicable to each question. Sect. 46 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), provides (so far as material) as follows: Sub-s. 1: "A person shall be disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or of a board of guardians if he— . . . . (*e*) is concerned in any bargain or contract entered into with the council or board, or participates in the profit of any such bargain or contract or of any work done under the authority of the council or board." Sub-s. 2 says: "Provided that a person shall not be disqualified for being elected or being a member or chairman of any such council or board by reason of being interested — . . . . (*c*) in any contract with the council or board as a shareholder in any joint stock company; but he shall not vote at any meeting of the council or board on any question in which such company are interested, except that in the case of a water company or other company established for the carrying on of works of a like public nature, this prohibition

may be dispensed with by the county council." Sub-s. 8 says: "If any person acts when disqualified, or votes when prohibited under this section, he shall for each offence be liable on summary conviction to a fine not exceeding 20*l*."

I can now state the facts which bear on the first point—namely, whether the defendant was "concerned in" or "participated in the profits of" any bargain or contract with the Islington Board of Guardians and therefore became disqualified. The defendant has been a member of that board since 1913. He has been chairman since April, 1922, and still fills that post. From the autumn of 1921 onward various contracts have been entered into between the Islington Board of Guardians and a limited company known as the Farmers and Cleveland Dairies Company, Ld., for the supply of milk. The details of the contracts are not material to the point I now deal with. Suffice it to say that the contracts have been large. They represent a total of about 22,000*l*. in all. The defendant has been for many years in the service of the Farmers and Cleveland Dairies Company, Ld. He first joined their staff as a joiner. In 1919 he became foreman or manager of their wheelwrights' shop. He has had and still has about three men under him. At all material times his salary has been about 4*l*. 10*s*. per week. In addition he is provided with a set of living rooms at the company's depot, No. 12 East Street North. He is also provided with light and fuel. He is a weekly servant. There is no written agreement. His wife is also (I mention incidentally) employed at 12 East Street North by the company at a substantial weekly wage. I may further mention (incidentally) that his brother-in-law is assistant relieving officer to the Islington Board of Guardians. Those are all the facts proved by the plaintiff, and upon them he submits that the defendant was "concerned in" or "participated in the profits of" the contracts between the Board of Guardians and the Farmers, etc., Company. Here is a far-reaching point. To make the issue clear I state at once that I am bound to find on the evidence before me that the defendant never received any bonus from the Farmers

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Company; that he never received any sum for and in respect of the contracts made by his employers with the guardians, that he has not made any bargain for such bonus or such other sum, and that his remuneration has not depended on the profits or losses made by his employers on their contracts with the Board or on their general trade. I so find on the evidence given before me.

Upon the above facts has the defendant become disqualified? The real point seems to be whether the defendant is "concerned in" the contracts I have named. If he is not concerned in them it seems plain, in such a case as that now before me, that he cannot be said to "participate in the profits." But it would seem from the words of the Act that a person may be "concerned in" a contract even though he does not participate in the profits. The wording is characterised by the usual obscurity of legislative enactments on the like matters. In view of the decisions cited to me it is well here to call attention to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193, which provides: "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act." Upon consideration I venture to think that these words are substantially similar in effect to those in s. 46 of the Local Government Act, 1894, and hence the decisions under the Public Health Act, 1875, must be borne in mind. I also call attention to the words of s. 12, sub-s. 1, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). They are these: "A person shall be disqualified for being elected and for being a councillor, if and while he— . . . . (*c*) has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council." I venture to think that in substance these words are similar to those in s. 46 of the Local Government Act, 1894, and hence the decisions upon them must not be overlooked. It is a matter for comment that Parliament, when dealing with the same subject matter in local government affairs, should, for no apparent reason,

use different instead of similar words in the various enactments. It seems plain that the object of s. 46 is to strike in pungent fashion at corruption, whether direct or indirect. The detailed and numerous affairs of local government bodies offer a fruitful area for the practice of pecuniary impropriety.

In *Nutton* v. *Wilson* (1) Lord Esher said, when referring to the substantially similar clause in the Public Health Act, 1875: "I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation."

Many cases were cited to me as bearing on the true interpretation of s. 46. They are relevant because they touch the construction of substantially similar clauses in other Acts. Most of them are well collected in Macmorran on the Local Government Act, 1894, 4th ed., pp. 153–155, and they are usefully presented also in Lumley's Public Health Acts, 9th ed., pp. 954 et seq., and Rawlinson's Municipal Corporation Acts, 10th ed., pp. 22 et seq.

A man is of course "concerned" in a contract if he is in any way a party to it, whether as a sole contractor or as a partner or as an undisclosed principal. A concealed interest is as much an interest as an open interest. The Court will always look at the substance and not at the colourable externals, as Lord Loreburn L.C. said in *Norton* v. *Taylor* (2): "no device to conceal the real nature of the transaction would prevail." But the Courts have gone far beyond direct contractual participation as making a man "concerned" or "interested" in a contract. Thus in *Nutton* v. *Wilson* (3), the defendant, a member of a local board, was held to be "concerned" in a contract because he had made a sub-contract (in value about 2*l.* 10*s.*) for a part of the work included in a contract made by another person with the board. This was a rigorous interpretation by the Court of Appeal of the word "concerned," and apparently they

(1) (1889) 22 Q. B. D. 744, 747. (2) [1906] A. C. 378, 380.
(3) 22 Q. B. D. 744.

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approved the case of *Tomkins* v. *Jolliffe*. (1) There may be of course a class of contract or sub-contract which is quite outside the purview of the section. If for example a member of a board takes a ticket for a ride in a tramcar belonging to the local body such a contract would be outside the section: see *Holden* v. *Southwark Corporation* (2), per Astbury J. Excluding however such special circumstances the word "concerned" and the word "interested" have a very wide meaning. Thus in *Hunnings* v. *Williamson* (3) the brother of the defendant made a contract with a vestry created under the Metropolis Management Act, 1855, and in order to carry it out borrowed money from the defendant, who took as security an assignment of the contract. It was held that the defendant was "interested." In *Barnacle* v. *Clark* (4) Darling J. said, in referring to somewhat similar words in s. 34 of the Elementary Education Act, 1870: "It is intended that members of public bodies shall be free from any suspicion of deriving profit, directly or indirectly, by reason of the position they hold." Perhaps the most striking extension of the meaning of the words "share or interest in any contract" is given by the recent decision of Salter and Roche JJ. in *England* v. *Inglis* (5), where they dealt with s. 12 of the Municipal Corporations Act, 1882, already cited. The headnote states as follows: "An 'interest' in a contract within the meaning of s. 12, sub-s. 1, must be a pecuniary, or, at least, a material interest, but it need not be a pecuniary advantage." In that case the defendant was held liable to a penalty although all that he gained from the contract (which was his son's contract) was the indirect advantage that it helped to advertise his (defendant's) business. Roche J. agreed (6) with the definition of the county court judge that "the interest required by the statute must, I think, be a pecuniary or material interest, not a mere sentimental interest such as that which a father may have in the prosperity of a son." I respectfully concur with

(1) (1887) 51 J. P. 247.
(2) [1921] 1 Ch. 550.
(3) (1883) 11 Q. B. D. 533.
(4) [1900] 1 Q. B. 279, 284.
(5) [1920] 2 K. B. 636.
(6) Ibid. 640.

Roche J. I will cite one further decision only on this aspect of the point I am dealing with. It is important. I refer to *Whiteley* v. *Barley*. (1) There it was held by the Court of Appeal that an officer of a local board appointed to superintend drainage work and who received a percentage on the total outlay was "concerned or interested" in the contract between the board and their contractor. I ought to add that the case already mentioned of *Norton* v. *Taylor* (2) must, I assume, always be remembered as imposing some limit on such apparently wide words as "concern" or "interest." It is unfortunate that the Privy Council, in the very brief opinion given, did not state the measure of disapproval or approval given by them to the decisions cited before them. Such an omission throws case law into a state of uncertainty. I need say no more here.

The conclusion of the matter is that the decisions have gone far, but in my opinion the words in the decisions upon s. 46 of the Local Government Act, 1894, and the other Act do not go far enough to show that the defendant here, on the facts I have found, was "concerned in" or "participated in" the profits of the contracts between the Board and the defendant's employers—i.e., apart from his being a shareholder in the Farmer's Company as hereafter mentioned. If I could have found that the defendant arranged for any bonus or commission on any of the contracts or had made any arrangement whatsoever for any pecuniary participation, however cleverly concealed, I should have decided against him. In some respects I regret the conclusion I have reached. The fact that the defendant was chairman of the Islington Board of Guardians might well tend to stabilise his position with the Farmers and Cleveland Dairies Company, Ld., his employers. The risks of dismissal would be less. The chances of promotion would be greater. His claim for a pension, if made, might receive more favourable consideration. His request for a rise in wages might be more genially regarded. The indirect advantages might be many. There is no evidence here however that any of them has been

(1) (1888) 21 Q. B. D. 154. (2) [1906] A. C. 378.

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sought for or granted. I am aware that the decision I now give may be just as applicable if the defendant had been general manager of the Farmers Company, and I realize the weight of that point. If Parliament wishes to hit such a case as the present the legislation must be strengthened. Further reasons for the regret I have just expressed will appear when I deal with the next point—i.e., the question of the defendant's votes on certain contracts. My final remarks on the present question turn on two cases to which my attention was drawn in the course of the arguments. They have caused me difficulty. In *Hill & Co.* v. *Hill* (1) Kekewich J. held that a covenant not to engage in or be in any way concerned or interested in a particular business was broken by the covenantor being employed as servant in such a business at a weekly salary. The decision was based on the word "concerned." A substantially similar decision seems to have been given by Bacon V.-C. in *Jones* v. *Heavens*. (2) To avoid undue extension of this judgment, which has to deal with so many matters, I will not cite the other decisions at my hand in which *Hill & Co.* v. *Hill* (1) and *Jones* v. *Heavens* (2) have been discussed. They can be found by research. Nor will I state in detail the reasons which lead me to the view that those two cases do not here apply. I will only say broadly that in my opinion they must be confined to the subject matter with which they deal. I do not think they are applicable to s. 46 of the Local Government Act, 1894, which deals with a special subject in a special way and for a special purpose. If the principle of *Hill & Co.* v. *Hill* (1) and *Jones* v. *Heavens* (2) had applied to the words I have quoted from the Public Health Act, 1875, the Municipal Corporations Act, 1882, and the like statutes, then a good many weighty decisions have been based on reasons which were superfluous.

The next point raised by the plaintiff is that the defendant became disqualified on the ground that being a shareholder in the Farmers and Cleveland Dairies Company, Ld., he voted

(1) (1886) 55 L. T. 769. (2) (1877) 4 Ch. D. 636.

at meetings of the board on a question in which that company was interested: see s. 46, sub-s. 2 (*c*). I must state here that s. 59 of the Local Government Act, 1894, incorporates (inter alia) Sch. I. of the Public Health Act, 1875. That Schedule contains (inter alia) the following relevant provisions: "3. Every local board shall from time to time at their annual meeting appoint one of their number to be chairman for one year at all meetings at which he is present." "6. The names of the members present, as well as of those voting on each question, shall be recorded, so as to show whether each vote given was for or against the question." "7. Every question at a meeting shall be decided by a majority of votes of the members present, and voting on that question." "8. In case of an equal division of votes the chairman shall have a second or casting vote."

The facts are these: The Farmers Company has 30,000*l.* capital issued in 1*l.* shares. It has paid steady dividends of about 10 per cent. There are about 180 shareholders. The defendant has held for many years one 1*l.* share. Two of his relatives, his aunts, hold 330 shares each in the company. Upon the evidence before me I must find that the defendant has no present interest in those 660 shares. He may have anticipation of succession to his aunts, but that is immaterial. For the purposes of s. 46 I conceive that it matters not whether a person holds one share or a thousand shares. Many of the decisions show a refusal by the Courts to give any real effect to the de minimis doctrine. The reasons for this refusal are obvious.

Now did the defendant, being a shareholder of the Farmers Company, vote on a question in which that company was interested in breach of sub-s. 2 of s. 46. The point is one of mixed fact and law. The question of fact here was to some extent in issue. Many of the details need not be stated. I shall summarize the facts as I find them. The contracts by the Farmers Company with the board were obtained after tender. The tenders of that company and other firms who tendered were considered first by the Finance Committee (of which the defendant was a member, but not chairman)

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and then by the full board, of which the defendant was chairman. For the purpose of this judgment it will suffice (for reasons hereafter appearing) if I deal with one contract. Prior to September 14, 1922, the board had asked for tenders for the supply of milk from October, 1922, to March, 1923. On September 14, 1922, a meeting of the board was held. Twenty-two members were present, including the defendant, who occupied the chair. Seven tenders were opened and laid before the board, including a tender from the Farmers Company. Some of the other tenders were lower than that of the Farmers Company. After discussion, in which defendant took part, he moved a resolution that the consideration of the tenders be deferred. This resolution was carried unanimously. The following is the printed minute: "Milk. The Great Eastern Dairy Company, 69–71, Old Montague Street, E. 1. The Manor Farm Dairy Limited, Manor Farm, Highgate, N. The Farmers and Cleveland Dairies Company Limited, 13, East Street, N. 1. London Wholesale Dairies Limited, 9, Harrow Road, W. 2. R. H. French, 1, Guilford Street, W.C. 1. A. Stapleton & Sons, Limited, Brooklands Farm, Stoke Newington, N. 16. The Cheshire and Shropshire Milk Depots Limited, 34, Nantwich Road, Crewe, Cheshire. Resolved. That the consideration of the tenders be deferred and that a letter be sent to the several persons tendering asking if they wished to amend their tenders."

That is the minute. As a result amended tenders were received from all the firms with the exception of A. Stapleton & Sons, Ld., who did not receive the letter which the clerk of the board states was posted to them inviting a fresh tender. On September 27 a meeting of the Finance Committee of the board was held. The defendant was present. It was unanimously resolved that the tender of the Farmers Company be accepted, and that a recommendation to that effect be made to the full board. On October 5, 1922, a meeting of the full board was held. The defendant was in the chair. A Mr. Wood moved that the action of the committee be approved and that the tender of the Farmers

Company be accepted. This resolution was put by the defendant and carried unanimously.

In my opinion the defendant voted at each of the three meetings I have mentioned on a question in which the Farmers Company was "interested." The defendant tried to draw a distinction, when giving evidence, between "unanimous" and "nemine contradicente." I can see no distinction on the facts here. Another witness, the clerk to the board, tried to distinguish between "general agreement" and "carried unanimously"; I can see no distinction. The minutes satisfy me that there were no dissentients and so does the evidence. The minutes indicate that there were no abstentions from voting and so does the evidence. The defendant voted just as much as any of the other members present. If he did not vote no one voted and an absurdity would result. He admitted in evidence that he "agreed" with the resolutions passed when he was present. I think it reasonably plain that he voted on each occasion. A man may give his vote in divers ways, either by writing, or by hand, or by voice, or by conduct—e.g., by nod. The form in which acquiescence is given matters not if acquiescence be actually indicated. There is no direct authority on the matter. I need only say of *Ex parte Orde* (1) that it is not adverse, I think, to the view I have expressed. I hold that the defendant voted, as I have stated.

In the course of the evidence before me other meetings and other contracts were closely investigated. For reasons I state later I need not deal with them in detail. But I feel bound, in the public interest, to say a few words on some general aspects of the case. I acquit the defendant of the charge of corruption made against him by the plaintiff; the evidence does not support that charge. But I do not acquit him of impropriety of conduct. He was an employee of the Farmers Company and a shareholder of that company. His aunts, moreover, held a substantial number of shares. The instincts of high integrity should have led the defendant to abstain from taking any part in proceedings which might

(1) (1871) L. R. 6 Ch. 881.

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favour the financial interests of his employers and his company. So far from following those instincts the defendant, I am satisfied, took a course which tended to the pecuniary advantage of those employers and that company.

Many disturbing details were revealed in the long and careful hearing before me. The defendant is a man of strong character, he wields a powerful influence on the board. I am satisfied that he used that influence to aid the Farmers Company. I feel bound to hold that the Farmers Company has been favoured by the board through the influence, direct or indirect, of the defendant. The defendant felt, I doubt not, that every contract gained by the Farmers Company strengthened his position with that company. He was in a position in which, should he vote against a proposed contract by the board with the company, he might find a notice of dismissal awaiting him. His situation with the Farmers Company was inconsistent with his obligation of impartial judgment as a member of the board. I need say no more, my duty is done by the remarks I have made.

So far I have stated my views on the question of law already dealt with and I am indebted to Mr. Pritt for his able argument thereon. The next question, an important one, is whether the plaintiff is entitled to maintain this action. Let me state briefly the plaintiff's position. He lives with his parents at 59 Southgate Road in the parish of Islington, and has so lived since 1911. His father is a chemist. The plaintiff has no special right to any part of the house; he is just a member of the family; he is not a ratepayer. He is an inhabitant only in the sense that he lives in the parish and in such sense only is he a parishioner. He has never earned any money. He has the parliamentary vote, but no municipal vote. He pays his parents nothing. He was the highest unsuccessful candidate in the April, 1922, election for membership of the Board of Guardians of Islington. He is a prospective candidate, he states, for the next election to be held. Those are all the facts I need at present state. Now let me take his claims. First he asks that the defendant do pay him two penalties of 20*l.* each for having sat and

voted on September 14, 1922, and October 5, 1922. Can he recover them? In my opinion the answer is clearly, no. Sect. 46 provides that if any person acts when disqualified or votes when prohibited by the section he shall for each offence be liable on summary conviction to a fine not exceeding 20*l*. It is plain that the Act created a new duty and a new liability, and that it prescribed a specific remedy in a Court of summary jurisdiction for recovery of the penalty for breach. That remedy only can be followed. An action in the High Court will not lie for the penalty: see *Doe* v. *Bridges* (1); *Barraclough* v. *Brown*. (2) Hence, I did not think it necessary in the earlier part of my judgment to deal with more than one contract.

I pass to his next claims. They are these: First, a declaration that the defendant was disqualified; and, secondly, an injunction restraining the defendant from acting as a member of the board of guardians. Will such an action lie for either? Here is a practical point of novelty and importance. The plaintiff naturally relies on *Walsh* v. *Grimsley*, heard before Bigham J. on November 29, 1900, and reported only in the Times of November 30, 1900, and the Law Journal of December 8, 1900, p. 663. The effect of that decision is given in Lumley's Public Health, vol. i., 9th ed., p. 960, as follows: "A person disqualified may also be restrained by injunction from acting." The like statement is made in Macmorran's Local Government Act, 1894, 4th ed., p. 158. If that be the actual decision it strongly supports the plaintiff here. In view of the doubts I felt I sent to the Record Office for the proceedings. They are now before me. The writ is dated November 19, 1900, and it is as follows: "The plaintiff's claim is as a parochial elector and ratepayer of the Urban District of Bicester and a member of the Council for the same Urban District for an injunction restraining the defendant from acting and continuing to act until the 15th April, 1901, as chairman of and as a member of the Urban District Council of Bicester." The record of the result on November 29, 1900, is this: "The judge declared

(1) (1831) 1 B. & Ad. 847, 859.

(2) [1897] A. C. 615.

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that the defendant is disqualified from remaining on the Urban District Council of Bicester being concerned in a certain contract complained of contrary to the Local Government Act, 1894, and directed that judgment should be entered for the plaintiff with costs." There were no pleadings. The case, however, cannot, I think, be cited as an authority. First, because the point was never argued at all; and, secondly, because I see that on November 23, 1900, Day J. in chambers made the following order: "It is ordered that this case be tried without a jury. Defendant waiving the point that the plaintiff should have applied for a writ of quo warranto." I therefore cannot treat *Walsh* v. *Grimsley* as an authority on the question. I must deal with the point as new. I may here say however that if all parties consent proceedings by action may be useful and probably permissible. The case of *Holden* v. *Southwark Corporation* (1) was exceptional in its circumstances. Here the defendant strongly contends that the present action will not lie. Thus the issue is whether proceedings by way of the prerogative writ of quo warranto be the only remedy open to the plaintiff, or whether he can bring this action. An action of this character is, apart from *Walsh* v. *Grimsley*, quite unfamiliar. I can draw no useful distinction between declaration and injunction. If a declaration can be granted, why not an injunction? If an injunction, why not a declaration? The matter of novelty does not press me unduly. Procedure and substantive law should alike be capable of expansion. Rigidity of law is not a merit in a growing nation. But there are here other considerations than mere novelty. Here is a question of substituting an action with all its particular character for quo warranto with its special features and requirements and history. The vista is a wide one. If such an action as this can be brought, why not an action for a certiorari to justices to bring up and quash a conviction or an action for prohibition directed to a county court or a Court of summary jurisdiction? Now let me say at once that I recognize the effect of s. 15 of the Judicature Act, 1884, which

(1) [1921] 1 Ch. 550.

provided that "proceedings in quo warranto shall be deemed to be civil proceedings whether for purposes of appeal or otherwise." But that section does not give an action where none had previously existed. All it does is to strike the criminal element from quo warranto proceedings. Moreover, Order LIX. of the Rules of the Supreme Court appears to recognize that proceedings on the Crown side (of which quo warranto is one) shall stand on a different footing to an action. I recognize also the effect of Order XXV., r. 5, as to declaratory judgments and orders. It is a beneficent rule and should be widely applied, but in my opinion it was never intended to apply to a case such as that now before me; see for example *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1) and *Flint* v. *Attorney-General.* (2)

I deem it clear on principle that prior to the Judicature Acts no such action as this would have lain. I cannot find that either the Judicature Acts or Rules enable it to be brought. I may point out that the effect of Order LIII. of the Rules of the Supreme Court is that a certain class of action for mandamus may be brought. But even upon that rule it has been held that an action for a mandamus will not lie if a prerogative writ be the proper remedy: see the instructive cases of *Baxter* v. *London County Council* (3); *Salford Corporation* v. *Lancashire County Council* (4); *Smith* v. *Chorley Rural Council* (5), affirming Kennedy J. (6), and the illuminating notes to Order LIII. in the Yearly Practice. These authorities, although upon mandamus, are strikingly adverse to the plaintiff here. It will be of advantage to those who are interested in this case to consider Order I., r. 1, of the Rules of the Supreme Court, 1883, and the clear and full notes thereto in the Yearly Practice. I point out the important fact that the Attorney-General is not a party to this action. If he was a party, other considerations might arise. I cannot undertake within the limits of this judgment to cite the many decisions which

(1) [1898] 2 Ch. 331.
(2) [1918] 1 Ch. 216.
(3) (1890) 63 L. T. 767.
(4) (1890) 25 Q. B. D. 384.
(5) [1897] 1 Q. B. 678.
(6) Ibid. 532.

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bear indirectly on the point now before me. They surge upon one "like the long wash of Australasian Seas." Apart from the Judicature Acts and Rules it is important to consider briefly the actual nature of quo warranto proceedings. The grant of quo warranto process is to some extent discretionary. In Shortt on Informations, Halsbury's Laws of England, vol. 10, and Short and Mellor on Crown Office Practice, 2nd ed., will be found a vast array of cases, and much of the older learning will be seen in Cole's Law and Practice relating to Criminal Informations and Informations in the nature of Quo Warranto (published in 1843). Apparently quo warranto will lie with regard to the office of member of a board of guardians: see Shortt on Informations, pp. 125 and 126. I will state only a few prominent features of quo warranto proceedings which tend to show that such an action as the present should not be allowed. Firstly, the Crown Office Practice requires that application for quo warranto must be made by a competent relator and the Court will exert inquiry on the point: see Short and Mellor, 2nd ed., p. 183, and see also p. 172. If an action be allowed this point could be escaped by a plaintiff. Secondly: It is required by r. 40 of the Crown Office Rules that "every application for an information in the nature of a quo warranto shall be by motion to a Divisional Court." If an action be allowed this requirement would be evaded. Thirdly: Rule 43 of the Crown Office Rules requires that the relator shall file a verifying affidavit. If an action be allowed this requirement could be evaded. Fourthly: Rule 48 enables a defendant, who does not intend to defend, to "enter a disclaimer." If an action be allowed the defendant would be deprived of this right, which has direct technical consequences. Fifthly: The Crown Office Practice provides for "judgment of ouster" in proper cases. No provision exists whereby this could be given in an ordinary action. I may add that the forms of quo warranto proceedings set out in Shortt on Informations, at pp. 555 et seq., may usefully be contrasted with the proceedings in an ordinary King's Bench action. The quo warranto forms are appropriate to the special remedy.

There are two further important features on which I desire to say a few words. The first is that of status. Apart from his past and prospective candidature (which I have already mentioned) the plaintiff is a mere dweller in Islington parish; he is not a ratepayer. Upon an application for quo warranto the question would arise whether he be a proper relator. He argued that he possessed the needed competence and submitted that to be a mere dweller in the parish was enough. He relied on such cases as *Rex* v. *Hodge* (1); *Rex* v. *Parry* (2); and *Reg.* v. *Quayle.* (3) It is not at all clear, however, that in those cases the Court, when using the word "inhabitant," did not mean the occupier of a house—although not on the burgess list: cf. *Reg.* v. *Thirlwin.* (4) A householder is one thing; a mere dweller, transitory or permanent, may be quite another thing: see the somewhat uncertain passages in Short and Mellor, 2nd ed., p. 184; Shortt on Informations, pp. 157 and 162; Rogers on Elections, 18th ed., vol. iii., p. 499; and Halsbury's Laws of England, vol. 10, p. 136. As I hold that the present action will not lie I do not propose now to express an opinion on the status of the plaintiff with respect to any application for quo warranto.

The final feature is that of motive. Upon this I ought to say a few words in view of the prominence it assumed in the proceedings before me. In an action like the present (if it lay) it seems probable that the question of motive would be, in substance, irrelevant. So the plaintiff argued, and his argument seems to derive some support from the cases I observe in the notes to Order LIII. in the Yearly Practice: see, e.g., *Mutter* v. *Eastern and Midlands Ry. Co.* (5) It is plain, however, that in quo warranto proceedings the Court can and will inquire into the conduct and motives of the relator: see *Rex* v. *Parry* (2); *Rex* v. *Trevenen* (6); Halsbury's Laws of England, vol. 10, pp. 134 and 135, and Shortt on Informations, pp. 149 and 154. The point is well settled.

(1) (1819) 2 B. & Ald. 344*n*.
(2) (1837) 6 Ad. & E. 810.
(3) (1840) 11 Ad. & E. 508.
(4) (1864) 9 L. T. 731; 33 L. J. (Q. B.) 171.
(5) (1888) 38 Ch. D. 92.
(6) (1819) 2 B. & Ald. 479.

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Although I have just ruled that this action will not lie I must, in justice to the defendant, state some facts briefly. The plaintiff was fully cross-examined by Mr. Pritt for the defendant. In the early part of 1919 the defendant Griffiths, acting as chairman of the Islington Board of Guardians, signed an order under the Lunacy Act, 1890, whereby the plaintiff was taken to a certain institution for care and treatment. In April, 1919, he commenced an action against the defendant and a doctor for breach of duty. That action ultimately went to the House of Lords, and the plaintiff lost it: see *Everett* v. *Griffiths*. (1) The proceedings before me in this action were long, but the plaintiff's appeal in the House of Lords just mentioned lasted ten days, or more. Since 1919 he has persecuted the defendant and also the Islington Board of Guardians with litigation. Incessant proceedings by him have been taken in many Courts. The defendant has been subjected to unending anxiety and loss. The plaintiff has failed in every litigation. The only point on which he secured an order for costs against Mr. Griffiths was when a bankruptcy petition against the plaintiff was dismissed in March, 1923, on the ground that the plaintiff had no assets whatsoever and no prospect of any. On this dismissal he got an order for 7*l.* costs against Mr. Griffiths. Although at that time the plaintiff owed Mr. Griffiths a very heavy sum for costs on the earlier litigation, yet the plaintiff at once put an execution into the private house of Mr. Griffiths and seized his domestic goods. This was a grossly improper thing to do, not merely because the plaintiff owed a large sum to Mr. Griffiths, but also because the act of execution was in breach of the plaintiff's understanding with Mr. Griffiths' solicitor. The plaintiff has publicly stated that he will never pay one penny of the several thousand pounds of costs he owes to Mr. Griffiths and the board of guardians. By every device of persecution which ingenuity can suggest or vindictiveness instigate has the plaintiff pursued the defendant for the past five years.

Under these circumstances what should I decide as to the

(1) [1921] 1 A. C. 631.

plaintiff's motives in bringing this present action? Motives are subtle things. It was said by Brian C.J. in the reign of Edward IV. that "the thought of man is not triable." Vide Year Book 17 Edw. IV. 1, and Pollock on Torts, 12th ed., p. 35. But if not triable in the fifteenth century it is certainly triable at the present day.

In my opinion these present proceedings were commenced from the primary motives of resentment and revenge. But I do not think that the plaintiff believed the action to be ill-founded. On the contrary, I think he believed it to be well-founded. I take the view that he acted when issuing the writ not merely from the motives I have named but also from the sense that public interests required a disclosure in open Court of those facts which, to some extent only, appear in the judgment I now give. It happened that in this action the rancorous feelings of the plaintiff coincided with his instincts of public duty as to the matters I have dealt with. When conducting the lengthy proceedings before me he showed no lack of courtesy or ability, and it is a pity that he wastes on litigation the talents which he might better employ in other ways.

Holding as I do that the action cannot be maintained I dismiss it with costs. I do not regret the time occupied, for I regard the questions here raised as important from several points of view, and I have, for reasons peculiar to this case, deemed it my duty to face them and not to avoid them. There is a counterclaim by the defendant for 352*l.* 10*s.* in respect of some taxed costs due to the defendant. They are a very small part of the body of costs to which the plaintiff has put the defendant in various proceedings. To this counterclaim there is no defence, and I give judgment for the defendant upon it for the amount claimed with costs.

Judgment for defendant.

Solicitors for defendant: *Samuel Price, Sons & Robertson.*

R. F. S.

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—— *Allen* v. *Coltart & Co.* (1883) 11 Q. B. D. 782.
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—— *Att.-Gen.* v. *Parr and Others* [1923] 2 K. B. 456.
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—— *Chatterton* v. *Terrell* [1923] A. C. 578.
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—— *Church* v. *Inclosure Commissioners* (1862) 11 C. B. (N. S.) 664.
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—— *Hughes, In re* [1893] 1 Q. B. 595.
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—— *Jones* v. *Boyce* - (1816) 1 Stark. 493
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—— *Jones* v. *Mills* (1861) 10 C. B. (N. S.) 788.
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Distinguished. ALIANZA CO., LD. *v.* COMMISSIONERS OF INLAND REVENUE - - - **C. A. 870**

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8 Edw. 7, c. 67 (Children), s. 58, sub-ss. 1, 2; s. 74, sub-ss. 2, 3: LONDON COUNTY COUNCIL *v.* BIRMINGHAM CORPORATION - - - - **Div. Ct. 248**

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10 Edw. 7 and 1 Geo. 5, c. 24 (Licensing (Consolidation)), ss. 15, 70, 81: COMMISSIONERS OF CUSTOMS AND EXCISE *v.* GRIFFITH - **C. A. 735**

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5 Geo. 5, c. 21 (British Ships (Transfer Restriction)), s. 1: BROCKLEBANK (T. & J.), LD. *v.* THE KING **Avory J. 647**

5 & 6 Geo. 5, c. 89 (Finance (No. 2)), s. 31: WILCOCK *v.* PINTO & CO. **Rowlatt J. 304**

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6 & 7 Geo. 5, c. 39 (Anglo-Portuguese Commercial Treaty), s. 1: SANDEMAN *v.* GOLD - - **Div. Ct. 107**

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9 & 10 Geo. 5, c. 35 (Housing, Town Planning, &c.), Part I., s. 1: NIXON *v.* ERITH URBAN DISTRICT COUNCIL - **Bailhache J. 87, C. A. 819**

9 & 10 Geo. 5, c. 50 (Ministry of Transport), s. 2: GREAT SOUTHERN AND WESTERN RY. CO. OF IRELAND *v.* THE KING - - **Rowlatt J. 154**

9 & 10 Geo. 5, c. 56 (Solicitors), s. 7, sub-s. 2: *In re* A SOLICITOR - **699**

9 & 10 Geo. 5, c. 100 (Electricity (Supply)), ss. 5, 6, 7: REX *v.* ELECTRICITY COMMISSIONERS - - **C. A. 171**

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10 & 11 Geo. 5, c. 17 (Increase of Rent and Mortgage Interest (Restrictions)), ss. 1, 3, 12: MICHAEL *v.* PHILLIPS **Div. Ct. and C. A. 16**

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10 & 11 Geo. 5, c. 17 (Increase of Rent and Mortgage Interest (Restrictions)), s. 12, sub-s. 1 (*g*), s. 15, sub-ss. 1, 2: KEEVES *v.* DEAN. NUNN *v.* PELLEGRINI - - **C. A. 685**

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10 & 11 Geo. 5, c. 18 (Finance), s. 52, sub-s. 2 (*a*); s. 53, sub-s. 2 (*b*): INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LD. **C. A. 390**

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10 & 11 Geo. 5, c. 48 (Indemnity), s. 1, sub-s. 1; s. 2, sub-s. 1 (*b*): BROCKLEBANK (T. & J.), LD. *v.* THE KING - - **Avory J. 647**

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10 & 11 Geo. 5, c. 67 (Government of Ireland), s. 41, sub-s. 1: WAKELY *v.* THE TRIUMPH CYCLE CO., LD. **C. A. 214**

10 & 11 Geo. 5, c. 72 (Roads), s. 12: GRIFFITHS *v.* STUDEBAKERS, LD. **Div. Ct. 102**

10 & 11 Geo. 5, c. 76 (Agriculture), s. 10, sub-s. 6: MINISTER OF AGRICULTURE AND FISHERIES *v.* DEAN **C. A. 851**

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